

ALASKA LEGISLATURE COMMITTEE FILES 1985-1986 86/2

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of the association, long-term contracts and leases with himself/herself or with an affiliated entity. Management and employment contracts, leases of recreational or parking areas or facilities; other contracts or lease between the association and a declarant or an affiliate of a declarant; or any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the existing circumstances may be terminated.

Sec. 34.08.370. BYLAWS. The bylaws of an association must provide: for the number of members of the executive board, and titles of the officers of the association; for the election of the officers of the association; for the qualifications, powers, and duties, terms of office and manner of electing and removing executive board member and officers and filling vacancies; which, if any, of its powers the executive board or officers may delegate; which of its officers may prepare, execute, certify and record amendments to the declaration; for a method of amending the bylaw; and other matters allowable under the declaration.

Sec. 34.08.380. UPKEEP OF COMMON INTEREST COMMUNITY. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Limited common elements are treated as common elements, unless the declaration provides otherwise.

Sec. 34.08.390. MEETINGS. A meeting of the association must be held at least once each year. Other special meetings may be held. Notice of meetings must be given to all unit owners and must state the items on the agenda.

Sec. 34.08.400. QUORUMS. Unless the bylaws provide otherwise, a quorum is present throughout a meeting if persons entitled to cast 20% of the votes for election of the board are present in person or by proxy at the beginning of the meeting. Unless the bylaws specify a larger percentage, a quorum is considered present throughout a meeting of the board if persons entitled to cast 50% of the votes on the board are present at the beginning of the meeting.

Sec. 34.08.410. VOTING AND PROXIES. Votes allocated to a unit may be cast under a proxy duly executed by a unit owner. Other provisions regarding proxies are included. Provisions for lessee voting is included. Votes allocated to a unit owned by the association may not be cast.

Sec. 34.08.420. TORT AND CONTRACT LIABILITY. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. The association or any unit owner has a right of action against the declarant for any losses suffered as a result of an action based upon a tort or breach of contract arising during any period of declarant control.

Sec. 34.08.430. CONVEYANCE OR ENCUMBRANCE OF COMMON ELEMENTS. A condominium or planned community association may sell or encumber

portions of the common elements and a cooperative association may sell part, or encumber all of the cooperative.

Sec. 34.08.440. INSURANCE. The association shall maintain, to the extent reasonably available, property and liability insurance on the common elements. Association insurance on "stacked" units is required.

Sec. 34.08.450. SURPLUS FUNDS. Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of common expenses and reserves must be paid or credited to the unit owners proportionately.

Sec. 34.08.460. ASSESSMENTS FOR COMMON EXPENSES. Assessments must be made at least annually, and based on a budget adopted at least annually by the association. Assessment rules are provided. Any common expense caused by the misconduct of any unit owner may be assessed by the association against that unit exclusively.

Sec. 34.08.470. LIEN FOR ASSESSMENTS. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens enjoy statutory priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. As to first security interest the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the security interests of lenders. If the lender wishes, an escrow for assessments can be required. Other foreclosure provisions are included.

Sec. 34.08.480. OTHER LIENS. Provisions are included for other liens with special procedures and requirements for condominiums, planned communities and cooperatives.

Sec. 34.08.490. ASSOCIATION RECORDS. The association shall keep sufficiently detailed financial records and these must be available for reasonable examination.

Sec. 34.08.500. ASSOCIATION AS TRUSTEE. This section outlines the relationship between third persons dealing with the association.

ARTICLE IV: PROTECTION OF PURCHASERS

Sec. 34.08.510. APPLICABILITY. This section permits waiver or modification of Article IV protections in common interest communities where all units are restricted to nonresidential use. Public offering statements and resale certificates are not required on:

gratuitous disposition of a unit;

disposition pursuant to court order;

disposition by a government or governmental agency;

disposition by foreclosure;

disposition to a dealer;

disposition that may be canceled at any time and for any reason by the purchaser without penalty; or,

disposition of a unit in a planned community if the declaration limits the maximum annual assessment of any unit to \$300 and if the declarant has a good faith belief that the stated maximum will be sufficient to pay the expenses of the association.

Sec. 34.08.520 LIABILITY FOR PUBLIC OFFERING STATEMENT REQUIREMENTS. This section permits declarant to transfer responsibility for preparation of a public offering statement to successor declarants or dealers, provided the declarant furnishes the information needed by the successor or dealer to complete the statement. The person who prepares the public offering statement is liable for his/her own misrepresentations and material omissions. A person who delivers a public offering statement prepared by others is responsible for any such deficiencies only to the extent he knows or reasonably should have known of them.

Sec. 34.08.530. PUBLIC OFFERING STATEMENTS GENERALLY. This section protects the purchaser by giving him/her an opportunity to understand the nature of the unit which is being purchased. A lengthy list of information must be provided to each purchaser before a contract is signed.

Sec. 34.08.540. COMMON INTEREST COMMUNITIES SUBJECT TO DEVELOPMENT RIGHTS. This section requires disclosure in the public offering statement of the manner in which the declarant's exercise of development rights may affect purchasers who acquire units before those rights have been full exercised. The purpose is to put the purchaser on notice.

Sec. 34.08.550. TIME SHARES. This section requires additional disclosure in the public offering statement for ownership or occupancy of any units in time shares.

Sec. 34.08.560. COMMON INTEREST COMMUNITIES CONTAINING CONVERSION BUILDINGS. In the case of common interest community containing one or more conversion buildings, the disclosure of additional information relating to the condition of those buildings is required in the public offering statement. This is because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of common interest community sales.

Sec. 34.08.570. COMMON INTEREST COMMUNITY SECURITIES. The purpose of this section is to permit the declarant to file or deliver, in lieu of a

public offering statement specifically prepared to comply with the provision of this chapter, the prospectus filed with and distributed pursuant to the regulation of the U. S. Securities and Exchange Commission.

Sec. 34.08.580. PURCHASER'S RIGHT TO CANCEL. This section provides a "cooling off" period for purchasers. Purchasers must be given a public offering statement and all amendments prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. Any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must be provided to the purchaser. Unless the purchaser is given the public offering statement more than 15 days before execution of a contract, the purchaser may cancel the contract within 15 days after first receiving it.

Sec. 34.08.590. RESALE OF UNITS. In the case of resale of a unit by a private unit owner who is not a declarant or a person in the business of selling real estate, a public offering statement need not be provided. However, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulation of the association and a variety of fiscal, insurance and other information concerning the common interest community and the unit must be provided.

Sec. 34.08.600. ESCROW OF DEPOSITS. This section applies to the sale by persons required to furnish public offering statements of residential units and of nonresidential units unless waived. It does not apply to resales of units between private parties.

Sec. 34.08.610. RELEASE OF LIENS. In the case of a sale of a unit where a delivery of a public offering statement is required, a seller, before conveying a unit, shall record or furnish to the purchaser releases of all liens. Exceptions are provided for real estate that a declarant has a right to withdraw from the common interest community.

Sec. 34.08.620. CONVERSION BUILDINGS. This section is an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners. When a declarant decides to convert a building to common interest ownership, 120 days notice of the conversion with a public offering statement must be given to the residential tenants and subtenants. If the building will be converted to residential use, the tenants must also be given a opportunity to purchase their units. The declarant is not required to offer residential tenants the right to purchase commercial units or to offer to sell to the tenants if the dimensions of their previous apartment have been substantially altered.

Sec. 34.08.630. EXPRESS WARRANTIES OF QUALITY. Expectations of the purchaser created by the particular conduct (facts, promises, rights, models, descriptions, etc.) of the declarant in connection with the inducement of the sale create express warranties of quality. This is based on the principle that once it is established that the declarant has acted to create particular expectations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the

expectation. Statement of mere opinion or commendation of the real estate or its value does not create a warranty.

Sec. 34.08.640. IMPLIED WARRANTIES OF QUALITY. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties are imposed only against declarants and dealers and not against unit owners selling their units to others.

Sec. 34.08.650. EXCLUSION OR MODIFICATION OF IMPLIED WARRANTIES OF QUALITY. Under this section implied warranties of quality may be disclaimed, however, the disclaimer to each defect or failure must be in a signed instrument. This is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain.

Sec. 34.08.660. STATUTE OF LIMITATIONS FOR WARRANTIES. Unless otherwise agreed to in a separate instrument executed by the purchaser, breach of any warranty obligations must be brought within 6 years after the cause of action arises.

Sec. 34.08.670. EFFECT OF VIOLATIONS ON RIGHTS OF ACTION. This section provides a general cause of action or claim for relief for failure to comply with this chapter by either a declarant or any other person subject to the chapter's provisions.

Sec. 34.08.680. LABELING OF PROMOTIONAL MATERIAL. This section requires the labeling of improvements depicted on promotional material to assure that purchasers are not deceived about improvements the declarant intends to make.

Sec. 34.08.690. DECLARANT'S OBLIGATION TO COMPLETE AND RESTORE. Except for improvements labeled "NEED NOT BE BUILT", the declarant must complete all improvements depicted on plans, representations, and promotional materials. The declarant is also liable for prompt repair and restoration of the common interest community following the exercise of any rights reserved or created to exercise a development right, alter units, relocate boundaries, subdivide, use units or common elements for sales purposes or exercise of easement rights.

Sec. 34.08.700. SUBSTANTIAL COMPLETION OF UNITS. The purpose of this section is to assure that the declarant is not able to obtain use of the purchaser's money until the purchaser is able to get a completed unit.

ARTICLE V. GENERAL PROVISIONS.

Sec. 34.08.710. VARIATION BY AGREEMENT. This chapter is generally designed to provide great flexibility in the creation of common interest communities, and therefore this section permits the parties to vary many provisions. In many instances, however, provisions of the chapter may not be varied because of the need to protect purchasers, lenders, and

declarants. This section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the chapter.

Sec. 34.08.720. SEPARATE TITLES AND TAXATION. Unless the declaration otherwise provides, a unit owner's interest in cooperatives is considered personal property. In condominiums or planned communities, each unit and its interest in the common elements constitutes a separate parcel of real estate. Each unit must be separately taxed and assessed. Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant. If there is no unit owner other than a declarant, the real estate comprising the common interest community may be taxed and assessed in any manner provided by law. The classification of the unit and its allocated interests as real property or as personal property is significant for purposes of such matters as tenure, sales, recordation, transfer taxes, property taxes, estate and inheritance taxes, testate and intestate succession, mortgage lending, the perfection, priority and enforcement of liens, and rights of redemption.

Sec. 34.08.730. APPLICABILITY OF LOCAL ORDINANCES, REGULATIONS, AND BUILDING CODES. The purpose of this section is to resolve the relative roles of the state and local communities in regulating the creation of common interest communities. The underlying concept is to make clear that the local government has a legitimate interest in regulating the use of real estate, in accordance with established zoning, building codes and similar practices, and that such practices continue to have equal applicability to common interest communities.

Sec. 34.08.740. EMINENT DOMAIN. The provisions of this chapter is not intended to supplant the usual rules of eminent domain but merely to supplement those rules in addressing the unique problems which eminent domain raises in the context of a common interest community.

Sec. 34.08.750. SUPPLEMENTAL GENERAL PRINCIPLES OF LAW APPLICABLE. This chapter displaces existing law relating to common interest communities and other law only as stated by specific sections and by reasonable implication therefrom. Unless specifically displaced, common law rights are retained.

Sec. 34.08.760. CONSTRUCTION AGAINST IMPLICIT REPEAL.

Sec. 34.08.770. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

Sec. 34.08.780. SEVERABILITY.

Sec. 34.08.790. UNCONSCIONABLE AGREEMENT OR TERM OF CONTRACT. Upon finding that a contract or contract clause was unconscionable at the time the contract was made, a court may refuse to enforce the contract in whole or part.

Sec. 34.08.800. OBLIGATION OF GOOD FAITH. This section sets forth a basic principle running throughout this chapter: in transactions

involving common interest communities, good faith is required in the performance and enforcement of all agreements and duties.

Sec. 34.08.810. REMEDIES TO BE LIBERALLY ADMINISTERED.

Sec. 34.08.820. ADJUSTMENT OF DOLLAR AMOUNTS. Calculation are outlined for adjustment of dollar amounts discussed in other sections.

Sec. 34.08.830. TRANSFER OF A UNIT IN A COOPERATIVE. If a unit in a cooperative is transferred by the unit owner the interest in the unit that is transferred is the right to possession of the unit under a proprietary lease coupled with the allocated interest of the unit. The association's interest in the unit is not affected by the transfer.

Sec. 34.08.990. DEFINITIONS.

Sections 2 and 3 make necessary revisions to other sections of Title 34.

Section 4 repeals the Horizontal Property Regimes Act. This is improper due to the fact that condominiums now in existence were formed under the old act and will continue to be regulated in part under that law. Unless existing declarations are amended to provide regulation under the Common Interest Ownership Act, only future occurrences or actions after the effective date of this chapter are governed by this new chapter.

Section 5 makes this act effect January 1, 1986.



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11/7/89
Date

SB

44

(FILE 2)

S U M M A R Y

The Uniform Common Interest
Ownership Act

UNIFORM COMMON INTEREST OWNERSHIP ACT

Between 1977 and 1981, the National Conference of Commissioners on Uniform State Laws (ULC) promulgated three Acts dealing with multiple-ownership forms of real estate. These were the Uniform Condominium Act, the Uniform Planned Community Act, and the Model Real Estate Cooperative Act. Each form of ownership involves a different organization of ownership interests. In condominiums, owners have title to their units and undivided shares in the common elements. A planned community has owners who own their own units, but the common elements are owned by the owners' association. Every owner is a member of the owners' association. In a cooperative, the association owns all the real estate. Cooperative members own shares in the association, and lease their individual units from the association. These are the principal differences between these forms of multiple ownership.

But these forms are greatly similar to each other, as well, and the similarities have greater practical significance than the differences. For all of them, there is an owners' association responsible for the affairs of the community. Every owner belongs, and has voting rights and the opportunity to participate in the governing board. The community, in all cases, assesses the owners for common expenses and maintenance. The association, in all cases, contracts for management and services for the whole project. The documentation for any multiple-ownership project during its life, although some language may vary slightly, is much the same. Any multiple-ownership form requires some kind of creation document or declaration, as an example, and these documents have much the same function, no matter the form. In short, the technical questions of ownership do not create an enormous difference between these forms when it comes down to matters of operation of a project. And the three earlier Acts by the ULC look very much alike.

So why not one Act that includes all forms within its scope? In response in 1982, the ULC has produced the Uniform Common Interest Ownership Act. It encompasses all forms of multiple or "common interest" ownership.

The major obstacle to such an Act is, basically, definitional. The Common Interest Ownership Act uses the new term "common interest community." It means "real estate with respect to which any person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in the declaration. 'Ownership of a unit' does not include holding a leasehold interest of less than [20] years in a unit, including renewal options." The basic determinant of applicability is obligation for assessments. All multiple-ownership arrangements call for assessments.

Then, the sub-forms, such as condominiums, planned communities, and cooperatives, are defined as kinds of common interest communities. So a developer may choose any form for his project, initially, designating that particular form in the declaration.

The Act then treats the subject of common interest communities, comprehensively, as the earlier Acts treated the individual forms, comprehensively. A comprehensive statute deals with the creation, financing, management and termination of these communities. It also provides for consumer protection and regulation. These subjects must be included before any legislation on common interest real estate can be considered comprehensive.

Creation begins with a declaration, which is the fundamental property document describing the common interest project and identifying it. This document is filed in the land records of the locality. The Act deals with a great number of issues relating to creation, such as unit and common element boundaries, allocation of common element interests and voting rights, rights of the developer in the property while sales of units go on, and procedures for amendment of the declaration. Of special interest is the concept of development rights, which permits the developer to reserve the right to add or subtract real estate, and to add units and common elements, in the declaration. This permits the developer to plan phased common interest projects as long as all effects upon owners' interests are described and disclosed at the outset.

This Act also provides for the other end of any common interest project in time. How can such a project be terminated if and when it is desirable and necessary? The answer

is to provide a procedure for termination and some rules to protect owners' specific rights. Actual termination requires the agreement of a substantial number of owners (suggested is 80% of the total number). The agreement must be recorded in the land records. Once the termination is authorized, the association, as trustee, oversees the actual termination of the declaration, the sale, if any, and the distribution of proceeds, if any. Owners receive exactly their share of the total interest, whether that be proceeds or an individual interest in the real estate. Without the termination procedure, there is no assurance that a project can be terminated or that ownership interests will be protected.

This Act, further, deals with the substantial interests of those who finance common interest projects. There are three key things it does. The Act limits any control of the project or the owners' association by lenders that adversely affects owners. It establishes clear priorities for liens or secured interests against the project or individual owners' interests. It allows the developer's lender or lenders to assume declarant rights so that failure of the developer does not, necessarily, mean failure of the project. The Act defines rights and obligations between lenders and others, generally, to keep the project going, once it has been launched.

The management provisions of the Common Interest Ownership Act establish a workable basis for the ongoing community which the project must become. A common interest ownership community is like a small municipality. It must be governed, and it must be governed democratically. The developer must establish the owners' association at least by the time the first sale is made. Every owner becomes a member upon purchase. The governing body is the Executive Board, elected by the owners on a regular basis. The Executive Board has all of the powers essential to governing the community, including the power to make and enforce assessments. Its members are, also, accountable to the owners as fiduciaries, and are held to that higher standard of care.

The developer has a strong interest in the governance of the community, diminished in proportion to the units he sells. He can, therefore, appoint the initial Executive Board and control it until his interest diminishes sufficiently. Under this Act, he relinquishes control by stages - giving up his Executive Board members at given times during the sell-out. He must relinquish total control at a specific

time, either at a given percentage of the sell-out (75% suggested) or within a specific time (2 years suggested), whichever comes first. Then, the developer may not capture the government of the community beyond the span of his own legitimate interests.

Since the developer, also, makes the initial contracts for maintenance and services, this Act, in addition, permits the association to repudiate his contracts after control passes to the owners. Developers and contractors are put on notice that burdensome, sweetheart contracts will not survive, if they are attempted.

The Act and the project declaration act as a kind of constitution for the community. For example, the Act establishes liability and allocation of risk for insurance purposes for all communities. These are basic provisions to which any common interest project is subject. The Act also empowers the Association to make its bylaws which function as the statutes of the community. The association governs itself, mostly, through its bylaws. The object of the Act is to make each community as autonomous a self-governing entity as possible. These various documents, coupled with the enabling provisions of this Act, are simply the tools to accomplish this purpose.

Consumer protection is accomplished with four basic controls on the sale from developer to purchaser, but it is important to note that this Act tries to provide stability in all phases of common interest ownership development. That stability is the most important characteristic of any project to any buyer. But the specific provisions to protect buyers fall into readily identifiable categories: disclosure, warranties, escrow of deposits, and rescission rights.

This Act requires an extensive public offering statement which must be delivered to a purchaser of a unit in any common interest project before a sales contract can be concluded. The statement must give the customer all the information essential to an adequate purchase decision. That kind of information includes accurate identification of the developer, information about the significant features of the project, and balance sheets and budgets, as examples. However, drafters of these documents are encouraged to summarize those items that may be summarized, in an effort to keep public offering statements more reasonable in volume and weight.

The public offering statement is linked to the buyer's rescission rights, another important aspect of buyer protection. Every buyer has a 15-day period from the time the public offering statement is delivered, within which any sales contract may be cancelled. This right gives the buyer time to consider the character of the purchase and to review his commitment - a cooling off period for the purchase decision. In addition, these rescission rights are part of the disclosure requirements so that the buyer is made aware of them before they accrue.

Tied, also, to the rescission rights and disclosure is the escrow requirement. Any deposit made in connection with a purchase must be placed in an appropriate escrow account. It is not possible, then, for deposits to be dissipated before buyers close on the purchase of a unit. If the buyer wishes to exercise his or her rescission right, or is faced with the seller's default in any way, deposits are safe.

What remains, then, for consumer protection is a remedy for defects that are the responsibility of the developer. This Act provides both express and implied warranties of sale. The seller is bound by any representation made with respect to quality of the project. In addition, whatever is affirmed expressly, and unless adequately disclaimed, the developer must deliver the unit in at least as good a condition as at the time of contracting. It must also be suitable for the ordinary uses to which such property may be put, and free of defects. For residential property, the developer warrants that the existing use does not violate any applicable law when conveyed to, or possessed by, the buyer. If seller and purchaser specifically agree, implied warranties may be waived. For other than residential property, the seller may use a general disclaimer of warranties. And warranties are subject to a statute of limitations in order to encourage timely litigation or settlement of any claims.

The Common Interest Ownership Act also provides for agency supervision of condominium development. The agency has the power to review disclosure. It has investigative and enforcement powers to protect purchasers. It should be noted, however, that the agency article is offered as an optional addition to this Act. Many states do not want to create new agencies or increase the authority and responsibility of old ones. Fiscal constraints underlie such decisions, for the most part. This Act tries to enhance self-enforcement by purchasers as much as possible. Purchasers

can sue for any violation of the Act and ask for attorney's fees. So, an agency presence is not mandatory, and may be considered as an extra element of protection to be added at a jurisdiction's desire.

It is not possible to describe all aspects of a comprehensive act's provisions. It is important to emphasize the need for comprehensiveness. If these kinds of common interest communities are to survive over time, the law must give to them a definite, discernible character. They must know what they are and what they can do. Only a comprehensive act addressing all of the major issues in a careful and complementary way can do the job fully. This is that Act.

UNIFORM COMMON INTEREST OWNERSHIP ACT

with some
Changes as appear
in SB 44

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FIRST YEAR
IN MONTEREY, CALIFORNIA
JULY 30 - AUGUST 6, 1982



WITH PREFATORY NOTE AND COMMENTS

UNIFORM COMMON INTEREST OWNERSHIP ACT

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ON UNIFORM STATE LAWS
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PREFATORY NOTE

The Uniform Common Interest Ownership Act (UCIOA) was adopted at the 1982 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

The explosive rise in land costs during the 1960s and 1970s, coupled with the desire of many consumers to own housing and recreational amenities which they could not afford except when owned with others, led to an extraordinary development of various forms of shared or "common" ownership of real estate. The three most common forms of common ownership have been condominiums, cooperatives and so-called "planned unit developments", or cluster housing projects. Each of these forms typically includes creation of a mandatory owners association to manage and maintain common amenities, while separate portions of the real estate—units—are occupied for individual use.

Title to the common amenities, or common elements, typically rests in varying entities depending on the form of ownership—they are owned on an undivided interest basis by the unit owners in condominiums, while the association "owns" the common elements in the case of cooperatives and PUDS. Similarly, legal title to the units lies with the unit owners in condominiums and PUDS, but with the association in the case of cooperatives. In all forms, however, the beneficial interest in both the common elements and the units lies with the unit owners, while management of the common elements is performed by the association.

While this common scheme is shared by all 3 forms, the legal consequences flowing from the choice of form differ substantially. Typically, condominiums are a highly regulated form of ownership under statute, often with consumer protection provisions in the statute. Cooperatives and PUDS are significantly less regulated. Moreover, when comparing laws between states, the statutes or common law governing condominiums, cooperatives and planned communities use varying and sometimes inappropriate terminology, and differ in numerous details, all of which make it difficult for a national lender to assess the appropriateness of project documents and of financing arrangements in those states. Finally, the varying statutes, and case law creating different "bundles of rights" for purchasers of common interest communities in the various states, make it difficult for the increasingly mobile consumer to become educated in this very complex area.

UCIOA represents the culmination of the Conference's 9-year effort to offer comprehensive legislation to the States which provides a common structural and regulatory scheme equally applicable to all three forms of common ownership.

DEVELOPMENT OF THE ACT

Condominiums

The first Uniform Act in the field was the Uniform Condominium Act (UCA), adopted by the Conference in 1977.

All states have statutes which provide for the creation of condominiums and establish some rules concerning their governance. The first statute in the United States was adopted in 1958 in Puerto Rico, and many present state statutes are patterned after that 1958 statute, or after the 1962 Federal Housing Administration model condominium statute. As the condominium form of ownership became widespread, however, many states realized that these early statutes were inadequate to deal with the growing condominium industry. In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums. As a result, some states have enacted more detailed and comprehensive "second generation" statutes. Many actual or potential problems, however, involving such matters as termination of condominiums, eminent domain, insurance, and the rights and obligations of lenders upon foreclosure of a condominium project, had not been satisfactorily addressed by any existing condominium statute. Moreover, the statutes differ widely from state to state. The Uniform Condominium Act was drafted primarily to resolve those various problems.

Planned Communities

The Uniform Planned Community Act (UPCA) was adopted at the 1980 Annual Meeting of the Conference.

While the historical development of condominiums can be traced to early statutory enactments at the state level supported by the conveyancing bar and national lending institutions, planned communities, historically, developed as a zoning concept at the local level. As single family subdivisions were increasingly supplanted in land planning theory by "clustering" to enhance the availability of shared open space, local governments required a zoning mechanism responsive to the implications of this new concept. That device, frequently, was the "planned unit development" or PUD zone, in which cluster housing could be built, at the same or greater density than the land in question would support as single family homes on individual lots. This zoning device typically permitted local zoning authorities wide discretion in reviewing and approving designs for the dwelling units as well as the common facilities.

The growing acceptance of PUD zoning techniques by local governments in turn created new interest in an old form of real estate ownership: the multi-unit residential "planned community" served by common area facilities owned and operated by a homeowners' association. Although such developments are remarkably similar to condominiums, they have operated for years under the common law without the benefit of statutory enablement and, in virtually all states, without the regulatory burdens and consumer protection benefits applicable to condominiums.

The homeowner associations that administer such common law planned communities often perform exactly the same functions as the condominium associations that administer statutory condominium regimes. They derive their powers from a declaration of covenants, conditions and restrictions (CC&R declaration) which is recorded at the beginning of the project and which relies for its enforceability on the state common law governing covenants which "run with the land". Not surprisingly, large portions of such CC&R declarations are indistinguishable from condominium declarations. The only basis on which CC&R regimes are exempted from state and local condominium regulation is that title to the common areas is held in the name of the homeowners' association instead of being divided among the unit owners as tenants in common.

These common-law homeowner association regimes take many forms. They include not only planned residential developments, which follow the classic models described in the Home Association Handbook promulgated in 1962 by the Urban Land Institute and which inspired FHA Form 1400, but also various forms of cooperative ownership based on corporate forms, some real estate, some trust, and operative ownership based on real and personal property ownership. In addition, many other combinations of real and personal property ownership. In addition, new communities now are being formed which contain multiple layers of community associations having, at different levels, condominium, PUD or master association governance in as many combinations as there are draftsmen and problems to be solved.

Each of these multi-owner forms involve all of the important issues of consumer protection and association management, and many of the complex title matters such as termination and eminent domain, which had been addressed by the Conference in the condominium field through the Uniform Condominium Act. Ironically, however, while all of those questions are of equal importance in these forms of multiple ownership, and while various states have begun to address these problems for condominiums, almost no legislative attention has focused on planned communities, except to the extent that they are swept up in general home warranty statutes, or addressed on an *ad hoc* basis by local zoning officials.

The Conference was also mindful of the increasing and understandable inclination of developers, in the face of changing condominium legislation, to choose these alternative forms of developing multi-owner projects. This avoidance process acknowledged the often superior multi-owner arrangements possible under a homeowner association structure that avoids fractionalizing ownership of the common elements. The process also represents, however, an economic decision by developers to avoid, when possible, additional costs imposed by condominium legislation in the form of disclosure, escrow requirements, or restricted practices. The Conference believed that the states should have available for their consideration a uniform act which reflected the same public policies as are contained in the Uniform Condominium Act. In this way, a state could extend the same public policies reflected in UCA to this very common form of real estate development. This need for parallelism whenever appropriate was a major factor in the drafting of the Act as finally adopted.

The result of this process was a comprehensive Act which closely paralleled UCA, and thus would yield the same consumer protections, regulatory structure, and administrative benefits to unit owners in most multi-owner developments, regardless of how title to the common elements had been treated.

The 1980 UCA Amendments

As a result of the legislative process in the various states considering UCA from 1977 to 1980, and after review of UCA by the Drafting Committee on UPCA, a substantial number of amendments to the 1977 UCA were proposed to the Conference.

Many of these amendments were adopted at the 1980 annual meeting of the Conference, and were included in the current version of UCA. Most of those amendments were of a minor, non-substantial nature; they were intended to resolve insignificant technical questions, or to clarify the meaning of provisions susceptible to misinterpretation. A few amendments were adopted which resulted in more significant changes, either on particular matters of substance, or in the use of terms throughout the Act which simplified the structure and readability of the Act. A summary of the more significant amendments may be obtained from the Headquarters Office of the NCCUSL, Suite 510, 645 North Michigan Avenue, Chicago, Illinois 60611.

A second category of changes resulted from a decision of the Conference at its 1978 annual meeting that the Condominium and Planned Community Acts should contain identical provisions wherever possible, in order to facilitate the future consolidation of the two Acts. This required a large number of textual changes with no substantive effect.

Real Estate Cooperatives

One year after adoption of UPCA and the UCA amendments, the Model Real Estate Cooperative Act (MIRECA) was adopted at the 1981 Annual Meeting of the Conference. It closely tracked its two predecessor Acts, since consolidation of the three Acts was anticipated by the Conference. Accordingly, MIRECA, like the other Acts, was designed principally to insure that, to the extent practicable and consistent with the differences inherent in the various forms of ownership, consumers, developers and lenders would be able to identify a coherent and consistent pattern of rights and obligations applicable to all "common interest" developments, whether organized as condominiums, planned communities or cooperatives.

That Act contains comprehensive provisions designed to provide a unified and modern law applicable to the cooperative form of ownership of real estate. The Act has no applicability to the many cooperatives formed for such purposes as commodity marketing or consumer services. Moreover, while principally applicable to the ownership of residential real estate, a common form of ownership in many jurisdictions, the Act contemplates that, in appropriate cases, it may but need not be used for industrial or commercial real estate as well.

COMMON INTEREST OWNERSHIP

Real estate cooperatives are a very common form of apartment ownership in several jurisdictions; in other states, however, they are virtually unknown, save in areas where they have been created pursuant to a variety of low income housing programs sponsored by the United States Department of Housing and Urban Development. Although cooperatives are similar in a number of ways to condominiums and other forms of multiply owned real estate regimes, they have operated for years under the corporate law without the benefit of specific statutory enablement, and in virtually all states, without the regulatory burdens and consumer protection benefits available to condominiums.

As with planned communities, the associations that administer such cooperatives often perform exactly the same functions as condominiums. They typically derive their powers from a declaration of covenants, conditions and restrictions or some familiar form of instruments, be it in an offering plan, bylaws of the corporation, or a proprietary lease between the corporation which holds title to the property, and the tenants of that corporation who in fact hold the beneficial interest in the corporation and the property which it owns. Commonly, but by no means uniformly, the instruments which create the co-operative form of ownership are not recorded, and the enforceability of the instrument depends principally on the law of landlord and tenant, state corporate trust law, or other law peculiar to the form under which the cooperative was organized. Not surprisingly, large portions of the instruments which create the cooperative are indistinguishable from similar provisions in condominium or planned community declarations, since the instruments are obliged to resolve many of the same issues which arise in those forms of ownership.

Each of these multi-owner forms involve all of the important issues of consumer protection and association management, and many of the complex title matters, such as termination and eminent domain, which had been addressed by the Conference in the condominium field through the Uniform Condominium Act and the planned community field by the Uniform Planned Community Act. Ironically, however, as in the case of planned communities, while all of those questions are of equal importance in these forms of multiple ownership, and while various states have begun to address these problems for condominiums, almost no legislative attention has been focused on cooperatives.

THE UNDERLYING CONCEPT OF UCIOA

Nearly without exception, UCIOA achieves the goal of uniformity among all three forms of ownership simply by consolidating the three prior Acts of the Conference and adding a very few generic definitions. The principal new definition is "common interest community."

Because of the use of consistent definitions and policies in the three Acts preceding UCIOA, consolidation of the three in the merged Act was a relatively simple task. The section numbering system of UCIOA is entirely parallel with the other 3 Acts, and the language of UCIOA tracks, as applicable, with the cognate sections of those 3 Acts. Differences in result between the 3 Acts are preserved where appropriate. At the same time, during the drafting of UCIOA, in a few instances, it became clear that some differences in result were of form rather than legitimate substance. In those cases, the substantive result of one or more of the 3 Acts was changed to reflect a policy generally applicable in all forms.

The result is that a state wishing to consider legislation in the common interest ownership field has a range of choices from which to select. Many states will wish to adopt comprehensive legislation, providing maximum flexibility and certainty to all developers, lenders, and title insurers, while at the same time providing all unit purchasers and their associations a uniform level of disclosure, warranty protection, and other rights. In those states, the consolidated Act is a workable and desirable long-term solution. Other states may wish simply to adopt a modern condominium statute to replace an existing but plainly outdated, statutory structure. In those states, UCA alone is the obvious choice. Finally, in states where existing "second" or "third" generation condominium statutes are seen as satisfactory, but a need for additional certainty and structure is desirable for planned communities or cooperatives, the 2 Acts governing those forms of ownership are available. Following adoption of one of the 3 constituent Acts, it would be very feasible, by a few carefully considered amendments, to adopt UCIOA and thereby extend coverage to include all forms of ownership in the field.

COMMON INTEREST OWNERSHIP

UNIFORM COMMON INTEREST OWNERSHIP ACT

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ARTICLE 1

GENERAL PROVISIONS

PART 1

DEFINITIONS AND OTHER GENERAL PROVISIONS

§ 1-101. Short Title

This [Act] may be cited as the Uniform Common Interest Ownership Act.

§ 1-102. Applicability

Applicability of this [Act] is governed by Part II of this Article.

§ 1-103. Definitions

In the declaration and bylaws (Section 3-100), unless specifically provided otherwise or the context otherwise requires, and in this [Act]:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. A person "controls" a declarant if the person (i) is a general partner, officer, director, or employer of the declarant, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the declarant, (iii) controls in any manner the election of a majority of the directors of the declarant, or (iv) has contributed more than 20 percent of the capital of the declarant. A person "is controlled by" a declarant if the declarant (i) is a general partner, officer, director, or employer of the person, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the person, (iii) controls in any manner the election of a majority of the directors of the person, or (iv) has contributed more than 20 percent of the capital of the person. Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) "Allocated interests" means the following interests allocated to each unit: (i) in a condominium, the undivided interest in the common elements, the common expense liability, and votes in the association; (ii) in a cooperative, the common expense liability and the ownership interest and votes in the association; and (iii) in a planned community, the common expense liability and votes in the association.

(3) "Association" or "unit owners' association" means the unit owners' association organized under Section 3-101.

(4) "Common elements" means (i) in a condominium or cooperative, all portions of the common interest community other than the units; and (ii) in a planned community, any real estate within a planned community owned or leased by the association, other than a unit.

(5) "Common expenses" means expenditures made by, or financial liabilities of, the association, together with any allocations to reserves.

(6) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to Section 2-107.

(7) "Common interest community" means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration. "Ownership of a unit" does not include holding a leasehold interest of less than [20] years in a unit, including renewal options.

(8) "Condominium" means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

(9) "Conversion building" means a building that at any time before creation of the common interest community was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers.

(10) "Cooperative" means a common interest community in which the real estate is owned by an association, each of whose members is entitled by virtue of his ownership interest in the association to exclusive possession of a unit.

(11) "Dealer" means a person in the business of selling units for his own account.

(12) "Declarant" means any person or group of persons acting in concert who (i) as part of a common promotional plan, offers to dispose of his or his interest in a unit not previously disposed of or (ii) reserves or succeeds to any special declarant right [], or (iii) applies for registration of a common interest community under Article 5.

(13) "Declaration" means any instruments, however denominated, that create a common interest community, including any amendments to those instruments.

(14) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to (i) add real estate to a common interest community; (ii) create units, common elements, or limited common elements within a common interest community; (iii) subdivide units or convert units into common elements; or (iv) withdraw real estate from a common interest community.

(15) "Dispose" or "disposition" means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but the term does not include the transfer or release of a security interest.

(16) "Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.

(17) "Identifying number" means a symbol or address that identifies only one unit in a common interest community.

(18) "Leasehold common interest community" means a common interest community in which all or a portion of the real estate is subject to a lease the expiration or termination of which will terminate the common interest community or reduce its size.

(19) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of Section 2-102(2) or (4) for the exclusive use of one or more but fewer than all of the units.

(20) "Master association" means an organization described in Section 2-120, whether or not it is also an association described in Section 3-101.

(21) "Offering" means any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the common interest community is located.

*Located
At end of Bill*

(22) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity. [In the case of a land trust, however, "person" means the beneficiary of the trust rather than the trust or the trustee.]

(23) "Planned community" means a common interest community that is not a condominium or a cooperative. A condominium or cooperative may be part of a planned community.

(24) "Proprietary lease" means an agreement with the association pursuant to which a member is entitled to exclusive possession of a unit in a cooperative.

(25) "Purchaser" means a person, other than a declarant or a dealer, who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than (i) a leasehold interest (including renewal options) of less than 20 years, or (ii) as security for an obligation.

(26) "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests that by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

(27) "Residential purposes" means use for dwelling or recreational purposes, or both.

(28) "Security interest" means an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation. The term includes a lien created by a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in an association, and any other consensual lien or title retention contract intended as security for an obligation.

(29) "Special declarant rights" means rights reserved for the benefit of a declarant to (i) complete improvements indicated on plats and plans filed with the declaration (Section 2-109) or, in a cooperative, to complete improvements described in the public offering statement pursuant to Section 4-103(a)(2); (ii) exercise any development right (Section 2-110); (iii) maintain sales offices, management offices, signs advertising the common interest community, and models (Section 2-115); (iv) use easements through the common elements for the purpose of making improvements within the common interest community or within real estate which may be added to the common interest community (Section 2-114); (v) make the common interest community subject to a master association (Section 2-120); (vi) merge or consolidate a common interest community with another common interest community of the same form of ownership (Section 2-121); or (vii) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (Section 3-103(d)).

(30) "Time share" means a right to occupy a unit or any of several units during [5] or more separated time periods over a period of at least [5] years, including renewal options, whether or not coupled with an estate or interest in a common interest community or a specified portion thereof.

(31) "Unit" means a physical portion of the common interest community designated for separate ownership or occupancy, the boundaries of which are described pursuant to Section 2-105(n)(5). If a unit in a cooperative is owned by a unit owner or is sold, conveyed, voluntarily or involuntarily encumbered, or otherwise transferred by a unit owner, the interest in that unit which is owned, sold, conveyed, encumbered, or otherwise transferred is the right to possession of that unit under a proprietary lease, coupled with the allocated interests of that unit, and the association's interest in that unit is not thereby affected.

(32) "Unit owner" means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold common interest community whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the common interest community, but does not include a person having an interest in a unit solely as security for an obligation. In a condominium or planned community, the declarant is the owner of any unit created by the declaration. In a cooperative, the declarant is treated as the owner of any unit to which allocated interests have been allocated (Section 2-107) until that unit has been conveyed to another person.

COMMENT

1. The first clause of this Section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.

EXAMPLE:

A declarant might vary the definition of "unit owner" in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

2. The definition of "Affiliate of a declarant" (Section 1-103(1)) is similar to the definition of 12 U.S.C. Section 1730a, which prescribes the authority of the Federal Savings and Loan Insurance Corporation to regulate the activities of savings and loan holding companies, and in 15 U.S.C. Section 78c(a)(18), which defines persons deemed to be associated with a broker or dealer for purposes of the federal securities laws.

The objective standards of the definition permit a ready determination of the existence of affiliate status to be made. Unlike 12 U.S.C. Section 1730a(n)(2)(B), no power is vested in an agency to subjectively determine the existence of "control" necessary to establish affiliate status. Thus, affiliate status does not exist under the Act unless these objective criteria are met.

As a result of this definition, the association may, in some instances, be a declarant. Under the definition of "Affiliate of a declarant," it is possible that 20% of the unit owners may "act in concert" to control the activities of the association. While the mere casting of these votes at an association meeting would not normally constitute "concerted action" by those unit owners, other acts by individual unit owners might constitute such concerted ac-

tion. The consequences of that result are determined under Section 3-104.

3. Definition (2), "Allocated interests," refers to all of the interests which this Act requires the declaration to allocate to the common interest communities.

"Allocated interests" is defined differently with respect to the 3 forms of Ownership.

First, the important interests, common to all projects, are the proportionate shares of common expense liabilities, and votes as the association, allocated to each unit. In either a cooperative, condominium, or planned community, every unit in the project must have a share of the votes and common expense liabilities.

Second, because the common elements are "owned" by the association in a planned community or cooperative, in contrast to a condominium, there is no common element interest allocated to unit owners in a planned community or cooperative.

Third, in a cooperative, because unit owners have traditionally had an ownership interest in the cooperative corporation, either in the form of stock or a membership certificate, the Act continues to require allocation of an "ownership interest in the association" to each unit.

The common element or ownership interest has limited significance. One situation in which the common element interest allocation would be important, however, is the distribution of insurance proceeds following a loss where an entire condominium project is not required or replaced and insurance proceeds are distributed to unit owners. See Section 3-113(h). See also 2-118(j)(2).

4. Definition (1), "Common elements" is bifurcated. The Act adopts the UCA and MRECA definition with respect to condominiums or cooperatives. However, the Act adopts UPCA's definition with respect to planned communities.

5. Definitions (1) and (31), treating "Common element" and "Unit" as

should be examined in light of Section 2-102, which specifies in detail how the differentiation between units and common elements is to be determined in any given common interest community to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration, as long as the boundaries between units and common elements can be ascertained with reasonable certainty. The common elements include by definition all of the real estate in the condominium or cooperative not designated as part of the units.

6. Definition (7), "Common interest community," is new to this Act. The term creates one comprehensive definition of those interests governed by the Act. This generic definition, derived from the definition of planned community in UPCA, is used through the Act to refer collectively to the 3 particular forms of common interest community: condominiums, cooperatives and planned communities.

Each of these forms in turn, has a separate definition. "Condominium" and "cooperative" are defined precisely as they are in the Acts which apply to those forms. The definition of "planned community", however, is new, and, under UCIOA, becomes a residual concept. Any ownership arrangement which is a common interest community but which does not meet the definition of either a condominium or cooperative, would be a planned community. Thus, there are but three forms of common interest community: (1) condominiums; (2) cooperatives and (3) everything else.

7. Definition (8), "Condominium" makes clear that, unless the real estate title to the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if title to the common elements is in an association in which each unit owner is a member, the project is not a condominium, but a planned community.

8. Definition (9), "Conversion building," is important because of the protection which the Act provides in Section 4-112 for tenants of buildings which are being converted into a common interest community. The definition distinguishes between buildings which have never been occupied by any person before the time that the building is submitted to the cooperative form of ownership, and buildings, whether new or old, which have been previously occupied by tenants. In the

former case, because there have been no tenants in the building, the building would not be a conversion building, and no protection of tenants is necessary.

9. Definition (10), "Cooperative," makes clear that the Act applies only to cooperatives which constitute common interest communities. The common interest community real estate, moreover, must be owned by the association, which, under Section 3-101, may be organized as a profit or non-profit corporation, trust, trustee, partnership, or depending on the option adopted in a particular state, as an unincorporated association. In requiring, as does Section 3-101, that the association consist exclusively of "unit owners"—defined in MRECA as "proprietary lessors"—the definition tracks the usual requirements of cooperative instruments, which exclude from association membership persons who are not owners or proprietary lessors of the units.

The definition also recognizes the fundamental link between association membership and occupancy rights in providing that unit owners who are the members of the association are entitled to exclusive possession of their units under a proprietary lease—see Definition (24)—by virtue of their ownership interests in the assets of the association.

The ownership interest of a cooperative unit owner is a composite interest, which consists of the owner's ownership interests in the association and his right to occupy a unit pursuant to a proprietary lease. This interest, since it includes the proprietary interest under a lease, may not, as a theoretical matter, exist until a proprietary lease has in fact been executed by the declarant for the units in the cooperative. The definition "unit" resolves this theoretical gap by providing that the declarant is treated as the owner of cooperative interests which have not yet been created.

10. Definition (11), "Dealer," is a newly defined term in UCIOA. It was not used in any of the 3 separate Acts. It replaces, in many sections, the words "person in the business of selling (either) real estate (or) cooperative interests for his own account." Use of the term in UCIOA does not change the substantive results in any of the 3 Acts.

11. Definition (12), "Declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the common interest community, but who are not intended to be charged

with the responsibilities imposed on all declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold common interest communities, ground lessors. (Of course, such a person may become a declarant by subsequently succeeding to a Special declarant right). Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not declarants because these units were "previously disposed of" when originally conveyed.

If the association, itself, or in conjunction with another declarant, is offering units for sale to others, and if those units have not previously been sold or otherwise disposed of, then the association itself is a declarant.

Finally, a person who, while in control of the association, chooses not to exercise that control, is still a declarant.

The last bracketed clause in this definition must be deleted in any state which chooses not to enact Article 5 of the Act.

12. Definition (13), "Declaration," is defined as "any instruments, however denominated, that create a common interest community including any amendments to those instruments". Thus, the term would not only include the traditional condominium declaration with which most practitioners are familiar, or the declaration of covenants, conditions and restrictions (CC&R's) so common in planned unit developments. It would also include, for example, a series of deeds to units with common mutually beneficial restrictions, or to any other instruments which create the relationship which constitutes a common interest community. If those recorded instruments create that relationship, then those documents constitute a declaration and must contain, for new projects, the information required by Section 2-105.

The Declaration of a cooperative does not include the proprietary leases of the individual units, although a sample of such a lease might be attached as an exhibit to the declaration.

Similarly, the definition of "declaration" of any common interest community does not refer to the bylaws of the association or the documents creating the association. Such documents do not "create" the common interest community, but merely regulate its use after creation. The bylaws may, but

need not be, an exhibit to the declaration.

13. Definition (14), "Development rights," includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized and regulated in the case of condominiums, in an increasing number of jurisdictions, beginning with Virginia in 1974.

The concept of "development rights" lies at the heart of one of the principal goals of the Act, which is to maximize the flexibility available to a developer seeking to adjust the size and mix of a project to the demands of the marketplace, both before and after creation. The principal constraint on that flexibility is the obligation of disclosure, and its impact on marketing. Thus "development rights" include the rights to:

(a) increase the size or density of a project, either by adding real property to it, or by creating new units, common elements or limited common elements on either the original land or within the original buildings, or on any other land or buildings subsequently added;

(b) change the mix of units, common elements and limited common elements, either by subdividing units, or by converting units into common elements or limited common elements; and

(c) reduce the size of a project by withdrawing real property—whether land, entire buildings, or particular units—from it.

As a matter of simple logic, there are few other things that could be done to a real property regime which are not included within the concept of development rights. This great flexibility, particularly when coupled with the broad definitions of "unit" and "real estate", the power to create leasehold projects, and the right to subordinate unit mortgages to blanket mortgage on either the units or common elements, is an important element in the Act.

For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to "expand" the common interest community by adding an additional building on Parcel B, containing additional units, as part of the same common interest community. If he reserves the right to do so, i. e., to "add real estate to a common interest community," he has reserved a "development right."

In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the common interest community from the outset, even though he may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will expand into both parcels. If the project is a success, his documentation will be simpler if both parcels were included in the common interest community from the beginning. If his hopes are not realized, however, and it becomes necessary to withdraw all or part of Parcel B from the common interest community and devote it to some other use, he may do so if he has reserved such a development right "to withdraw real estate from the common interest community." The portion of the garage which extends into Parcel B may be left in the common interest community (separated from the remainder of Parcel B by a horizontal boundary), or the garage may be divided between Parcels A and B with appropriate cross-easement agreements.

The right "to create units, common elements, or limited common elements" has frequently been useful in the case of commercial or mixed use common interest communities, where the declarant needs to retain a high degree of flexibility to meet the space requirements of prospective purchasers who may not approach him until the common interest community has already been created. For example, an entire floor of a high-rise building may be intended for commercial buyers, but the declarant may not know in advance whether one purchaser will want to buy the whole floor as a single unit or whether several purchasers will want the floor divided into service units, separated by common element walls and served by a limited common element corridor. This development right is sometimes useful even in purely residential common interest communities, especially those designed to appeal to affluent buyers. Similarly, the development rights "to subdivide units or convert units into common elements" is most often of value in commercial common interest communities, but may be useful in certain kinds of residential common interest communities as well.

14. Definition (15), "Dispose" or "Disposition," includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a security interest is

not a "disposition," nor is any transfer of any interest to a person who is excluded from the definition of "Purchaser," *infra*. However, the term includes more than conveyances and would, for example, cover contracts of sale.

15. Definition (18), "Leasehold common interest community," should be distinguished from land which is leased to a common interest community but not subjected to the common interest community regime. A leasehold common interest community means, by definition, real estate which has been subjected to the common interest community form of ownership. In such a case, units located on the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the common interest community unit or the real estate underlying the unit would be removed from the common interest community if the lease were not exercised or renewed. On the other hand, real estate may not be subjected to common interest community ownership, but may be leased directly to the association or to one or more unit owners for a term of years.

16. In this Act, in contrast to UPCA, Definition (23), "Planned Community," is a residual concept. That is, any common interest community which fails to fall into the category of a condominium or a cooperative is, by definition, a planned community. The definition also indicates that a planned community may have a condominium or cooperative as a constituent element.

17. Definition (24), "proprietary lease," describes that instrument initially executed by a cooperative association with the purchaser of a unit, granting the right of exclusive occupancy of a unit. The term and its significance is more fully treated in the comments to the definition of "Unit".

18. Definition (25), "Purchaser," includes a person who acquires any interest in a unit, even as a tenant, if the lease including renewal options, entitles him to occupy the premises for more than 20 years. Excluded from the definition, however, are mortgagees, declarants and dealers. Persons excluded from the definition of "purchaser" do not receive certain benefits under Article 4, such as the right to a public offering statement (Section 4-102(c)) and the right to rescind (Section 4-108).

19. Definition (20), "Real estate," is very broad, and is very similar to the definition of "real estate" in Section 1-201(10) of the Uniform Land Transactions Act.

Although often thought of in two-dimensional terms, real estate is a three-dimensional concept, and the third dimension is usually important in the condominium and planned community context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards to a point in the center of the planet. In most condominium and planned communities, however, as in so-called "air rights" projects, ownership does not extend "from the center of the earth to the heavens" because units are stacked on top of units or units and common elements are interstratified. In such cases, the upper and lower boundaries must be identified with the same precision as the other boundaries.

20. Definition (28), "Security interest," encompasses any interest in real or personal property which secures payment or performance of an obligation. Thus, for example, regardless of whether or not the units in a cooperative are treated as real or personal property pursuant to Section 1-105(a), a lender's interest in a unit securing the debt is a "security interest." This definition is adapted from Sections 3-102 and 3-103 of the Uniform Land Transactions Act.

21. Definition (29), "Special declarant rights," seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a common interest community.

Any person who possesses a special declarant right would be a "declarant," including any who succeed under Section 3-104 to any of those rights. Thus, the concept of special declarant rights transfers the imposition of obligations on those who possess the rights. Under Section 3-104, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to Section 3-104.

22. Definition (30), "Time share," is based on Section 1-102(14) and (18) of the Model Real Estate Time-Share Act.

23. Definition (31), "Unit," describes a tangible, physical part of the project rather than a right in, or claim to, a tangible physical part of the

property. Therefore, for example, a "time-share" arrangement in which a unit is sold to 12 different persons, each of whom has the right to occupy the unit for one month does not create 12 new units—there are, rather, 12 owners of the unit. (Under the Section on voting (Section 2-110), a majority of the time-share owners of a unit are entitled to cast the vote assigned to that unit.)

Similarly, in a cooperative, the unit remains a physical part of the real estate; its legal title is vested in the association while the right to possession is held by the unit owner under a proprietary lease. The definition, however, makes it clear that the association's interest in the unit is unaffected by transfers of interests in that unit to or by unit owners. The unit owner's interest is a composite interest, which consists of an ownership interest in the association, coupled with the right to occupy a unit pursuant to a lease.

The definition makes clear that in the case of a cooperative, if a unit owned by a unit owner is sold, conveyed, or encumbered or otherwise transferred by the unit owner, the interest in such unit which is affected is the right to possession of that unit under a proprietary lease, coupled with the allocated interests of that unit. In recognizing the relationship between the physical "unit" and the nature of a unit owner's interest in that unit, and by describing that relationship concisely in the definition, the merged Act was able to delete the definition of "cooperative interest" as it was used in MRECA.

24. Definition (32), "Unit owner," contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities must be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example) as long as the seller holds title.

The definition makes it clear that a declarant, so long as he owns units in a common interest community, is the unit owner of any unit created by the declaration, and is therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.

In the special case of a cooperative, the declarant is treated as the owner of a unit or "potential unit" to which

allocated interests have been allocated, until that unit is conveyed to another.

§ 1-104. Variation by Agreement

Except as expressly provided in this [Act], its provisions may not be varied by agreement, and rights conferred by it may not be waived. A declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this [Act] or the declaration.

COMMENT

1. The Act is generally designed to provide great flexibility in the creation of common interest communities and, to that end, the Act permits the parties to vary many of its provisions. In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and declarants. Accordingly, this Section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself.

2. One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion controlling the votes of unit owners, this Section forbids the use by a declarant of any device to evade the limitation or prohibition of the Act or of the declaration.

3. The second sentence of the section is an important limitation upon the rights of a declarant. Today it is the practice in many jurisdictions, particularly those proscribing expansion of a condominium or planned community by statute, for a declarant to secure powers of attorney from all unit purchasers permitting the declarant unilaterally to expand the condominium or planned community by "unanimous consent" to include new units and to reallocate common element interests, common expense liability, and votes. With such powers of attorney, many declarants have purported to comply with the typical provision of "first generation" condominium statutes requiring unanimous consent for amendments of the declaration concerning such matters. The Act bars this practice.

4. The following sections permit variation:

Section 1-103. (Definitions). All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.

Section 1-105. (Separate Title and Taxation). This section permits the declarant of a cooperative to determine whether unit owners' interests are real or personal property.

Section 1-107. (Eminent Domain). The formulas for reallocation upon taking a part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied.

Article I, Part II, *Sections 1-202, 1-203, 1-205, 1-206, and 1-207*, permit a variety of elections to declarants and unit owners with respect to applicability.

Section 2-102. (Unit Boundaries). The declaration may vary the distinctions as to what constitutes the units and common elements.

Section 2-105. (Contents of Declaration). A declarant may add any information he desires to the required content of the declaration.

Section 2-108. (Limited Common Elements). The Act permits reallocation of limited common elements unless prohibited by the declaration.

Section 2-109. (Plats and Plans). There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.

Section 2-111. (Alterations Within Units). Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.

Section 2-112. (Relocation of Boundaries Between Adjoining Units). Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.

Section 2-113. (Subdivision of Units). If the declaration expressly so permits, a unit may be subdivided into two or more units.

Section 2-115. (Use for Sales Purposes). The declarant may maintain sales offices, management offices, and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.

Section 2-116. (Easement to Facilitate Exercise of Special Declarant Rights). Subject to the provisions of the declaration, the declarant and unit owners have easements for the purposes described.

Section 2-117. (Amendment of Declaration). The declaration of a non-residential common interest community may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.

Section 2-118. (Termination). The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential common interest community, a smaller majority. The declarant may require that the units be sold following termination even though none of them have horizontal boundaries.

In a cooperative, upon termination, the declaration may specify that association creditors have priority over the rights of unit owners, and their creditors.

Section 2-119. (Rights of Secured Lenders). The declaration may require lender approval of specified actions of unit owners or the association.

Section 2-120. (Master Associations). The declaration may provide for some of the powers of the Executive Board to be exercised by a master association.

Section 2-122. (Addition of Unspecified Real Estate). The declaration of a planned community may grant a declarant the right to add additional real estate to the project without stating the location of that real estate in the original declaration.

Section 3-102. (Powers of the Association). The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant. The declaration may authorize the association to assign its rights to future income.

Section 3-103. (Executive Board Members and Officers). Except as limited by the declaration or bylaws, the Executive Board may act for the association.

Section 3-106. (Bylaws). Subject to the provisions of the declaration, the bylaws may contain any matter in addition to that required by the Act.

Section 3-107. (upkeep of the Common Interest Community). Except to the extent otherwise provided by the declaration, maintenance responsibilities are set forth in this section, and income from real estate subject to development rights inures to the declarant.

Section 3-108. (Meetings). The bylaws may provide for special meetings at the call of less than 20 percent of the Executive Board or the unit owners.

Section 3-109. (Quorums). This section permits statutory quorum requirements to be varied by the bylaws.

Section 3-110. (Voting; Proxies). A majority in interest of the multiple owners of a single unit determine how that unit's vote is to be cast unless the declaration provides otherwise. The declaration may require that leases vote on specified matters.

Section 3-112. (Conveyance or Encumbrance of Common Elements). The declaration may vary the percentages of unit owners whose approval is required to convey or encumber common elements.

The declaration may also provide that a conveyance or encumbrance of common elements defeats prior encumbrances on those common elements.

Section 3-113. (Insurance). The declaration may vary the provisions of this section in non-residential common interest communities, and may require additional insurance in any community.

Section 3-114. (Surplus Funds). Unless otherwise provided in the declaration, surplus funds are paid or credited to unit owners in proportion to their common expense liabilities.

Section 3-115. (Assessments for Common Expenses). To the extent provided in the declaration, common expenses for limited common elements must be assessed against the units to which they are assigned, common expenses benefiting fewer than all the units must be assessed only against the units benefited, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.

Section 3-116. (Lien for Assessments). Unless the declaration provides otherwise, fines, late charges, and other fees are treated as assessments for lien purposes.

Section 4-101. (Applicability; Waiver). All of Article 4 is modifiable or waivable by agreement in a common interest community restricted to non-residential use.

Section 4-115. (Warranties). Implied warranties of quality may be excluded or modified by agreement.

Section 4-116. (Statute of Limitation on Warranties). The 6-year limitation may be modified by agreement of the parties.

5. While freedom of contract is a principle of this Act, and variation by agreement is accordingly

ble, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, see Section 1-113, or to enter into contracts which are unconscionable when

viewed as a whole, or which contain unconscionable terms. See Section 1-112. This Section derives from Section 1-102(3) of the Uniform Commercial Code.

§ 1-105. Separate Titles and Taxation

(a) In a cooperative, unless the declaration provides that a unit owner's interest in a unit and its allocated interests is real estate for all purposes, that interest is personal property. [That interest is subject to the provisions of [insert reference to state homestead exemptions], even if it is personal property.]

(b) In a condominium or planned community:

(1) If there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.

(2) If there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved development rights.

(c) Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes.

(d) If there is no unit owner other than a declarant, the real estate comprising the common interest community may be taxed and assessed in any manner provided by law.

COMMENT

1. Subsection (a) of this Section follows the MRECA provisions. The classification of the unit and its allocated interests as real property or as personal property is significant for purposes of such matters as tenure, sales, recordation, transfer taxes, property taxes, estate and inheritance taxes, testate and intestate succession, mortgage lending, the perfection, priority and enforcement of liens, and rights of redemption.

Subsection (a) resolves an important theoretical and practical issue which pervades the cooperative field: whether a unit owner in a cooperative holds an interest in real or in personal property. Subsection (a) permits the declarant to decide that issue for each cooperative on a project-by-project basis.

The issue arises from the fact that the unit owner's interest in the cooperative typically has elements of both real and personal property. His interest includes both a beneficial interest in the association—either through stock ownership or membership—which is clearly a personal property interest, and a long term "proprietary" or ownership interest under a proprietary lease in an apartment—clearly an interest in real estate.

While this is in many ways a highly theoretical issue, it has many practical consequences. For example, if the

unit owner's interest is a real estate interest, then that interest—aside from the association's interest—may be subject to real property taxes and conveyance taxes; the recording laws would apply to conveyance of those interests; and real estate foreclosure laws would apply to foreclosure of a lien against those interests. Moreover, a security interest in the unit owner's stock or membership certificate would not be effective against the stock without a security instrument being recorded on the land records. In general, none of Article 9 of the Uniform Commercial Code would be applicable to that interest, and all of the conveyancing rules would apply.

On the other hand, if the interest is a personal property interest—the result required by this Section in the absence of a provision in the declaration that the interest is real property—then all of Article 9 of the Uniform Commercial Code would apply to security interests in the unit, the real estate conveyancing rules would not apply, and the interest would be treated for all purposes as personal property.

2. This act, of course, would apply in all respects regardless of the characterization of the unit owner's interests. Thus, for example, recording of the declaration is required, whether or not the owner's interest in a cooperative

interest is real or personal property, because the cooperative itself is the real estate.

3. Whether an institutional lender may lawfully make loans on the unit owner's interest may or may not depend on whether that interest is characterized as real or personal property. That issue is not affected by this Act, however, but by other state law which may permit loans to be made by certain institutional lenders only if secured by an interest in real estate.

4. If a unit owner's interest is a real property interest, recordation of the proprietary lease in the land records is constructive notice of the unit owner's rights. If the unit owner's interest is a personal property interest, recordation of the lease in the land records would be ineffective as constructive notice of that interest, and Article 9 of the Uniform Commercial Code does not provide a mechanism for filing evidence of that ownership interest. It is likely, however, that holders of security interests in units which are personal property would adopt a procedure similar to that followed in Illinois with respect to land trusts, which have been held to be personal property in that state. Under Article 9 of the Uniform Commercial Code and Illinois common law, the secured party files notice of the lien and the lien is thereby perfected for 5 years, when it must be renewed.

5. Subsection (b) integrates the language of MRECA and MPCA regarding condominiums and planned communities. A condominium or planned community may be created, by the recordation of a declaration, long before the first unit is conveyed. This happens frequently, for example, with existing rental apartment projects which are converted into either condominiums or planned communities. Subsection (d) spares the local taxing authorities from having to assess each unit separately until such time as the declarant begins conveying units, although separate assessment from the date the common interest community is created may be permitted under general state law, which permits or requires separate

rate taxation of individual parcels of real estate. When separate tax assessments become mandatory under this Section, the assessment for each unit must be based on the value of that individual unit, under whatever uniform assessment mechanism prevails in the state or locality. Importantly, no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively, even though, in the context of planned communities, the common elements owned by the association might be subject to taxation as a separately owned parcel of real estate, in the absence of this provision. Any common element subject to development rights, however, must be separately assessed and taxed to the declarant, see Subsection (c), in recognition of the independent economic value that those development rights have. This would be true even if the real estate subject to development rights is a part of the common interest community and lawfully "owned" by the unit owners in common, since the rights are in fact an asset of the declarant.

6. If there is any doubt in a particular state whether a unit occupied as a residential dwelling is entitled to treatment as any other residential single-family detached dwelling under the homestead status, this Section should be modified to ensure that units are similarly treated.

7. Unlike the law of some states, this Section imposes no limitations on the power of a jurisdiction to tax units based on the fair market value of the individual units, rather than on the project as a whole. In most jurisdictions, experience has shown that upon conversion of an apartment building to a common interest form of ownership, the fair market value of the units exceeds the fair market value of that building prior to conversion. Accordingly, a jurisdiction under this Act may impose real estate taxes on common interest community units which reflect the fair market value of those units in the same way that the jurisdiction taxes other forms of real estate.

§ 1-106. Applicability of Local Ordinances, Regulations, and Building Codes

(a) A building code may not impose any requirement upon any structure in a common interest community which it would not impose upon a physically identical development under a different form of ownership.

(b) In condominiums and cooperatives, no zoning, subdivision, or other real estate use law, ordinance, or regulation may prohibit the condominium or cooperative form of ownership or impose any requirement upon a condominium or cooperative which it would not impose upon a physically identical development under a different form of ownership.

(c) Except as provided in subsections (a) and (b), the provisions of this [Act] do not invalidate or modify any provision of any building code, zoning, subdivision, or other real estate use law, ordinance, rule, or regulation governing the use of real estate.

COMMENT

1. The purpose of this section is to resolve the relative roles of the state and local communities in regulating the creation of common interest communities. The underlying concept is to make clear that the municipality has a legitimate interest in regulating the use of real estate, in accordance with long established zoning, building code and similar practices, and that such practices continue to have equal applicability to common interest communities as they do to purely rental projects. With respect to forms of ownership, however, this Act, as a state enactment, preempts the field and accordingly, except as provided in the Act, the municipality may not regulate the form of ownership, as opposed to the use of that real estate.

2. Consistent with the concept described in comment 1, subsections (a) prohibits discriminatory application of building codes against common interest communities by local law making authorities. Thus, if a building code imposes a requirement which cannot be met if property is owned as a common interest community but which would not be violated if all of the property constituting the common interest community were owned by a single owner, this Section makes it unlawful to apply that requirement or restriction to the common interest community. For example, in the case of a high-rise apartment building, if a building code requirement imposing a minimum fire wall rating between apartments would not prevent a rental apartment building from being built, this Act would override any requirement that might impose a higher fire wall rating between apartments merely because the same building might be owned as a common interest community.

3. While Subsection (a) prevents discrimination against all forms of common interest communities under building codes, Subsection (b) does not prevent local law making authorities from using zoning, subdivision and other real estate regulations to specifically regulate the planned community

form of ownership, in ways different from rental project, or condominiums. This distinction simply recognizes the existing practice in some communities that permits a local zoning board, as a condition of granting a cluster housing zoning permit, to require the right of prior plan approval. However, such regulations may not be used to prescribe the condominium or cooperative form of ownership, or to discriminate against these two types of common interest communities. Accordingly, a community could not prevent a condominium conversion by applying setback requirements between apartments which would not apply if all the apartments were owned by a single owner, or by requiring more parking for condominiums than for rental apartments.

4. Subsection (c) makes clear that, except for the prohibition on discrimination against common interest communities under building codes, and except for the prohibition on the use of zoning, subdivision and other real estate laws, ordinances, or regulations to ban or discriminate against cooperatives and condominiums, the Act has no effect on real estate or personal property laws. For example, a particular parcel of real estate submitted to the common interest community form of ownership might be of such size that all of the real estate is required to support a proposed density of units or to satisfy minimum setback requirements. Under this Act, part of the submitted real estate might be subject to a development right entitling the declarant to withdraw it from the common interest community, but the mere reservation of this right would not constitute a subdivision of the parcel into separate ownership. If a declarant or foreclosing lender at a later time sought to exercise the option to withdraw the real estate, however, withdrawal would constitute a subdivision and would be illegal if the effect of withdrawal would be to violate setback requirements, or to exceed the density of units permitted on the remaining parcel.

§ 1-107. Eminent Domain

(a) If a unit is acquired by eminent domain or part of a unit is acquired by eminent domain leaving the unit owner with a remnant that may not practically or lawfully be used for any purpose permitted by the declaration, the award must include compensation to the unit owner for that unit and its allocated interests, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, that unit's allocated interests are automatically reallocated to the remaining units in proportion to the respective allocated interests of those units before the taking, and the association shall promptly prepare, execute, and record an amendment to the declaration reflecting the reallocations. Any remnant of a unit remaining after part of a unit is taken under this subsection is thereafter a common element.

(b) Except as provided in subsection (a), if part of a unit is acquired by eminent domain, the award must compensate the unit owner for the reduction in value of the unit and its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, (i) that unit's allocated interests are reduced in proportion to the reduction in the size of the unit, or on any other basis specified in the declaration and (ii) the portion of the allocated interests divested from the partially acquired unit are automatically reallocated to that unit and to the remaining units in proportion to the respective allocated interests of those units before the taking, with the partially-acquired unit participating in the reallocation on the basis of its reduced allocated interests.

(c) If part of the common elements is acquired by eminent domain, the portion of the award attributable to the common elements taken must be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element must be equally divided among the owners of the units to which that limited common element was allocated at the time of acquisition.

(d) The court decree must be recorded in every [county] in which any portion of the common interest community is located.

COMMENT

1. The provisions of this statute are not intended to supplant the usual rules of eminent domain but merely to supplement those rules in addressing the unique problems which eminent domain raises in the context of a common interest community. Nevertheless, because the law of eminent domain differs widely among the various states, the law of each state should be reviewed to ensure that the eminent domain code and this Section are properly integrated. For example, Subsection (a) uses the words "the award must include compensation to the unit owner". This language, a change first made in MIRECA, suggests that, under other state law, compensation for other interests may be required in an appropriate case and the section does not limit that result.

2. When a unit is taken or partially taken by eminent domain, this section provides for a recalculation of the allocated interests of all units.

EXAMPLE 1

Suppose that all allocated interests in a 9-unit common interest community were originally allocated to the units

on the basis of size. If eight of the units are all equal in size and one is twice as large as the others, the allocated interests would be 20% for the largest unit and 10% for each of the other eight units.

Suppose that one of the smaller units is removed from the common interest community by a condemning authority. Subsection (a) provides that the allocated interests would automatically shift, at the time of the taking, so that the larger unit would have 22 2/3% while each of the small units would have 11 1/3%.

EXAMPLE 2

Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50%, leaving the remaining half of the unit usable. Subsection (b) provides that the allocated interests would automatically shift to 55 1/3% for the partially taken unit, 21 1/3% for the largest unit, and 10 1/3% for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does not mean that its allocated interests are only half as large

as before the taking. Rather, that unit participates in the reallocation in proportion to its reduced size. That is why the partially taken units' reallocated interests are $5\frac{2}{3}\%$ rather than 5%.

3. An important issue raised by this section is whether or not a governmental body acquiring a unit by eminent domain has a right to also take that unit's allocated interests and thereby assume membership in the association by virtue of its power of eminent domain. While there is no question that a governmental body may acquire any real property by eminent domain, there is no case law on the question of whether or not the governmental body may take a unit as part of a common interest community or must take the unit and have the unit excluded from the common interest community.

Subsection (a) merely requires that the taking body compensate the unit owner for all of his unit and its allocated interests, whether or not any common elements are acquired. The Act also requires that the allocated interests are automatically reallocated upon taking to the remaining units unless the decree provides otherwise. Whether or not the decree may constitutionally provide otherwise in the case of a particular taking (for example, by allocating the allocated interests to the government) is an unanswered question.

4. In the circumstances of a taking of part of a unit, it is important to have some objective test by which to measure the portion of allocated interests to be reallocated. Subsection (b) sets forth a formula based on relative size, but permits the declaration to vary that formula to some other more appropriate formula in a particular circumstance. The right to vary the formula in the declaration is important, since it is clear that the formula set forth in the statute may in some instances result in gross inequities.

EXAMPLE 1

Suppose in a commercial common interest community consisting of four units, each unit consists of a factory and parking lot, and the declaration provides that each unit's common expense liability, including utilities, is equal. Suppose further that the area of the factory building and parking lot in unit number 1 are equal, and that $\frac{1}{2}$ the parking lot is taken by eminent domain, leaving the factory and $\frac{1}{2}$ the lot intact. Under the formula set out in the statute, unit number one's common expense liability would be reduced even though its utilities might not be reduced at all, thus resulting in a windfall for the unit owner.

EXAMPLE 2

Suppose that a common interest community contains ten units, each of which is allocated a $\frac{1}{10}$ undivided interest in the association. Suppose further that a taking by eminent domain reduces the size of one of the units by 50%. In such case, the ownership interest of all the units will be reallocated so that the partially-taken unit has a $\frac{1}{10}$ undivided interest in the common elements and the remaining 9 units each has a $\frac{2}{10}$ undivided interest in the common elements. Thus, the partially-taken unit has a common element interest equal to $\frac{1}{2}$ of the common element interest allocated to each of the other units. Note that this is not equivalent to the partially-taken unit having a 5% undivided interest and the remaining 9 units each having a 10% undivided interest.

5. Even before the amendment formally acknowledging the reallocation of percentages required by this section is recorded, the reallocation is deemed to have occurred simultaneously with the taking. This rule is necessary to avoid the hiatus that otherwise could occur between the taking and the reallocation of interests, votes, and liabilities.

§ 1-108. Supplemental General Principles of Law Applicable

The principles of law and equity, including the law of corporations [and unincorporated associations], the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this [Act] except to the extent inconsistent with this [Act].

COMMENT

1. This Act displaces existing law relating to common interest communities and other law only as stated by specific sections and by reasonable implication therefrom. Moreover, unless specifically displaced by this statute, common law rights are retained. The listing given in this section is merely

an illustration, no listing could be exhaustive.

2. The bracketed language concerning unincorporated associations should be deleted if the enacting state requires incorporation of a unit owners' association. See the parallel language contained in Section 3-101.

§ 1-109. Construction against Implicit Repeat

This [Act] being a general act intended as a unified coverage of its subject matter, no part of it shall be construed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

COMMENT

This section derives from Section 1-101 of the Uniform Commercial Code.

§ 1-110. Uniformity of Application and Construction

This [Act] shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

COMMENT

This Act should be construed in accordance with its underlying purpose of making the law uniform with respect to all forms of common interest communities, as well as the purposes stated in the Prefatory Note of simplifying, clarifying, and moderating the law of common interest communities, promoting the interstate flow of funds to common interest communities, and

protecting consumers, purchasers, and borrowers against common interest community practices which may cause unreasonable risk of loss to them. Accordingly, the text of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.

§ 1-111. Severability

If any provision of this [Act] or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provisions or applications, and to this end the provisions of this [Act] are severable.

§ 1-112. Unconscionable Agreement or Term of Contract

(a) The court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result.

(b) Whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination, must be afforded a reasonable opportunity to present evidence as to:

- (1) the commercial setting of the negotiations;
- (2) whether a party has knowingly taken advantage of the inability of the other party reasonably to protect his interests by reason of physical or mental infirmity, illiteracy, inability to understand the language of the agreement, or similar factors;

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- (3) the effect and purpose of the contract or clause; and
- (4) if a sale, any gross disparity, at the time of contracting, between the amount charged for the property and the value of that property measured by the price at which similar property was readily obtainable in similar transactions. A disparity between the contract price and the value of the property measured by the price at which similar property was readily obtainable in similar transactions does not, of itself, render the contract unconscionable.

COMMENT

This section is similar to Section 2-302 of the Uniform Commercial Code and Section 1-311 of the Uniform Land Transactions Act. The rationale and comments provided in those sections are equally applicable to this section.

§ 1-113. Obligation of Good Faith

Every contract or duty governed by this [Act] imposes an obligation of good faith in its performance or enforcement.

COMMENT

This section sets forth a basic principle running throughout this Act: in transactions involving common interest communities, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as used in this Act, means observance of two standards: "honesty in fact", and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in Section 1-201 of the Uniform Simplification of Land Transfers Act, and Sections 2-103(1)(b) and 7-401 of the Uniform Commercial Code.

§ 1-114. Remedies to be Liberally Administered

(a) The remedies provided by this [Act] shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this [Act] or by other rule of law.

(b) Any right or obligation declared by this [Act] is enforceable by judicial proceeding.

§ 1-115. Adjustment of Dollar Amounts

(a) From time to time the dollar amounts specified in Sections 1-203 and 4-101(b)(7) must change, as provided in subsections (b) and (c), according to and to the extent of changes in the Consumer Price Index for Urban Wage Earners and Clerical Workers: U. S. City Average, All Items 1967 = 100, compiled by the Bureau of Labor Statistics, United States Department of Labor, (the "Index"). The Index for December, 1979, which was 230, is the Reference Base Index.

(b) The dollar amounts specified in Sections 1-203 and 4-101(b)(7), and any amount stated in the declaration pursuant to those sections, must change on July 1 of each year if the percentage of change, calculated to the nearest whole percentage point, between the Index at the end of the preceding year and the Reference Base Index is 10 percent or more, but

(i) the portion of the percentage change in the Index in excess of a multiple of 10 percent must be disregarded and the dollar amounts shall change only in multiples of 10 percent of the amounts appearing in this [Act] on the date of enactment;

- (ii) the dollar amounts must not change if the amounts required by this section are those currently in effect pursuant to this [Act] as a result of earlier application of this section; and
- (iii) in no event may the dollar amounts be reduced below the amounts appearing in this [Act] on the date of enactment.

(c) If the Index is revised after December, 1979, the percentage of change pursuant to this section must be calculated on the basis of the revised Index. If the revision of the Index changes the Reference Base Index, a revised Reference Base Index must be determined by multiplying the Reference Base Index then applicable by the rebasing factor furnished by the Bureau of Labor Statistics. If the Index is superseded, the Index referred to in this section is the one represented by the Bureau of Labor Statistics as reflecting most accurately changes in the purchasing power of the dollar for consumers.

**PART II
APPLICABILITY**

§ 1-201. Applicability to New Common Interest Communities

Except as provided in Sections 1-202 and 1-203, this [Act] applies to all common interest communities created within this State after the effective date of this [Act]. The provisions of [insert reference to all present statutes expressly applicable to planned communities, condominiums, cooperatives, or horizontal property regimes] do not apply to common interest communities created after the effective date of this [Act].

COMMENT

The question of the extent to which a state statute should apply to particular common interest communities involves 2 major conceptual problems: (1) whether the statute should require or permit different results for common interest communities created before and after the statute takes effect; and (2) whether differences in the forms of ownership, and the history of their development, requires different levels of applicability to those various forms.

Two conflicting policies are posed when considering the applicability of this Act to "old" and "new" common interest communities in the enacting state. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all common interest communities located in a particular state, regardless of whether the common interest community was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different common interest communities, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of common interest communities created under prior law, if any, and because of the requirements placed on declarants and unit owners' associa-

tions by this Act which might increase the costs of new common interest communities, different markets might tend to develop for common interest communities created before and after adoption of the Act.

On the other hand, to make all provisions of this Act automatically applicable to "old" common interest communities might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

Accordingly, the philosophy of this part reflects a desire to maximize the uniform applicability of the Act to all common interest communities in the enacting state, while avoiding the difficulties raised by automatic application of the entire Act to preexisting common interest communities.

In carrying out this philosophy with respect to "new" projects, the Act applies to all common interest communities "created" within the state after the Act's effective date; at the same time, special limitations on that applicability are provided in the case of certain new cooperatives and planned

communities in the following sections. This is the effect of the first sentence of the section. The second sentence makes clear that the provisions of old statutes expressly applicable to common interest communities do not apply to common interest communities created after the effective date of this Act. "Creation" of a common interest community pursuant to this Act occurs upon recodification of a declaration pursuant to Section 2-101; however, the definition of "Common Interest Community" in Section 1-103(7) contemplates that *de facto* common interest communities may exist, if the nature of the ownership interest fits the definition, and the Act would apply to such a project. Any real estate project which includes individually owned units meeting the definition is therefore subject to the Act if created with-

in the state after the Act's effective date. No intent to subject the project to the Act is required, and an express intention to the contrary would be invalid and ineffective.

The reference in this section to "all present statutes expressly applicable to condominiums or horizontal property regimes" is intended to distinguish between a state's condominium and other enabling statutes and those statutes which apply not only to common interest communities, but to other forms of real estate, such as taxation statutes or subdivision statutes. Thus, reference to the state's condominium or horizontal property regime enabling statutes should be included here, while references to taxation, subdivision, or other statutes which are not restricted solely to condominiums should not be included.

§ 1-202. Same; Exception for Small Cooperatives

If a cooperative contains only units restricted to nonresidential use, or contains no more than 12 units and is not subject to any development rights, it is subject only to Sections 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes) and 1-107 (Eminent Domain) of this [Act] unless the declaration provides that the entire [Act] is applicable.

Comment

Section 1-201 provides generally that the Act applies to all cooperatives "created" within the state after the Act's effective date. Under Section 1-202, however, only 2 sections of this Act automatically apply to a cooperative created after the effective date of this Act if that cooperative contains only 12 units or less and is not subject to development rights. Importantly, Section 1-105, which permits the declarant to determine whether the coop-

erative interests are real or personal property, does not apply unless the declarant elects to have the entire Act apply. Thus, the determination of whether the cooperative interests in a small cooperative created after the effective date of the Act are real or personal property may depend on other state laws. The Act, however, also permits such a cooperative to elect to be subject to the entire Act.

§ 1-203. Same; Exception for Small and Limited Expense Liability Planned Communities

If a planned community:

(1) contains no more than 12 units and is not subject to any development rights) or

(2) provides, in its declaration, that the annual average common expense liability of all units restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, may not exceed \$100, as adjusted pursuant to Section 1-115 (Adjustment of Dollar Amounts),

or AHFC financing

It is subject only to Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes) and 1-107 (Eminent Domain) unless the declaration provides that this entire [Act] is applicable.

COMMENT

Section 1-201 provides generally that the Act applies to all planned communities "created" within the state after the Act's effective date. Section 1-203, however, makes only a few of the Act's sections applicable to either planned communities containing 12 or

fewer units with no development rights or to *de minimis* planned communities—*as measured by the size of its common expense assessments*—unless the planned community's declaration makes the entire Act applicable.

§ 1-204. Applicability to Pre-existing Common Interest Communities

Except as provided in Section 1-205 (Same; Exception for Small Pre-Existing Cooperatives and Planned Communities), Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 1-107 (Eminent Domain), 2-103 (Construction and Validity of Declaration and Bylaws), 2-104 (Description of Units), 2-121 (Merger or Consolidation of Common Interest Communities), 3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 3-111 (Port and Contract Liability), 3-110 (Idem for Assessments), 3-118 (Association Records), 4-109 (Resales of Units), and 4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and Section 1-103 (Definitions) to the extent necessary in construing any of those sections, apply to all common interest communities created in this State before the effective date of this [Act]; but those sections apply only with respect to events and circumstances occurring after the effective date of this [Act] and do not invalidate existing provisions of the [declaration, bylaws, or plats or plans] of those common interest communities.

COMMENT

1. This section states the general rules of applicability of the Act to common interest communities which were created before the effective date of this Act.

2. The Act adopts a novel three-step approach to common interest communities created before the effective date of the Act. First, certain provisions of the Act described in Section 1-204 automatically apply to "old" common interest communities, but only prospectively, and only in a manner which does not invalidate provisions of declarations and bylaws valid under "old" law. Second, "old" law remains applicable to previously created common interest communities where not automatically displaced by the Act. Third, under Section 1-205, owners of "old" common interest communities may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by "old" law.

adopted in accordance with the procedure required by "old" law and the existing declaration and bylaws, and (b) the substance of the amendment does not violate this Act. In addition, as in the case of "new" projects, special exceptions are provided, in Section 1-205, for "small" projects.

3. Elaboration of the principles described in the last Comment may be helpful.

First, Section 1-201 provides that the enumerated provisions automatically apply to common interest communities created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of common interest communities created under early condominium statutes, or under common law. To avoid

provisions, as applied to "old" common interest communities, apply only to "events and circumstances occurring after the effective date of this Act"; moreover, the provisions of this Act are subject to the provisions of the instruments creating the common interest community, and this Act does not invalidate those instruments.

EXAMPLE 1

Under Section 1-204, Section 4-109 (Resale of Units) automatically applies to "old" common interest communities. Accordingly, unit owners in common interest communities established prior to adoption of the Act would be obligated after the Act's effective date to provide resale certificates to future purchasers of units. However, the failure of a unit owner to provide such a certificate to a purchaser who acquired the unit before the effective date of the Act would not create a cause of action in the purchaser, because the conveyance was an event occurring before the effective date of the Act.

EXAMPLE 2

Under Section 1-204, Section 3-118 (Association Records) automatically applies to "old" common interest communities. As a result, a unit owners' association of an "old" common interest community must maintain certain financial records, and all the records of the association "shall be made reasonably available for examination by any unit owner and his authorized agents", even if the "old" law did not require that records be kept, or access provided. If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.

Second, the prior laws of the state relating to common interest communities are not repealed by this Act because those laws will still apply to previously-created projects, except when displaced. Some states at one point made certain provisions of their condominium statutes automatically applicable to pre-existing condominiums. In certain instances, this attempted retroactive application has raised serious constitutional questions, has caused doubts to arise as to the continued validity of those condominiums, and has created general confusion as to what statutory rules should be applied.

Third, the Act seeks to alleviate any undesirable consequences of "old" law, by a limited "opt-in" provision, as provided in Section 1-206. More specifically, Section 1-206 permits the owners of a pre-existing common interest community to take advantage of the salutary provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the project instruments as specified in those instruments and in the pre-existing statute or common law.

EXAMPLE 3

Under most "first generation" condominium statutes, unit owners have no power to relocate boundaries between adjoining units. Under Section 2-112 of this Act, unit owners have such power, unless limited by the declaration. While Section 2-112 does not automatically apply to "old" common interest communities, if the unit owners of a pre-existing community amend their declaration to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under old law.

§ 1-205. Same; Exception for Small Pre-existing Cooperatives and Planned Communities

If a cooperative or planned community created within this State before the effective date of this [Act] contains no more than 12 units and is not subject to any development rights, it is subject only to Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), and 1-107 (Eminent Domain) unless the declaration is amended in conformity with applicable law and with the procedures and requirements of the declaration to take advantage of the provisions of Section 1-206, in which case all the sections enumerated in Section 1-204 apply to that cooperative or planned community.

COMMENT

Recognizing that pre-Act cooperatives or planned communities of fewer than 12 units ought not to be subject to more rigorous requirements than small cooperatives or planned communities created under the Act, this section provides that only the same sections applicable to small new cooperatives or planned communities will apply to small pre-Act cooperatives and planned communities, unless the declaration of a small pre-Act cooperative

or planned community is amended to take advantage of the amendment provisions of Section 1-206. If such an amendment is made pursuant to Section 1-206, the small pre-Act cooperative or planned community would be subject to all of the provisions applicable to large pre-Act cooperatives and planned communities, and further elections under Section 1-206 would then be possible.

§ 1-206. Same; Amendments to Governing Instruments

(a) In the case of amendments to the declaration, bylaws, or plats and plans of any common interest community created before the effective date of this [Act]:

(1) If the result accomplished by the amendment was permitted by law prior to this [Act], the amendment may be made either in accordance with that law, in which case that law applies to that amendment, or it may be made under this [Act]; and

(2) If the result accomplished by the amendment is permitted by this [Act], and was not permitted by law prior to this [Act], the amendment may be made under this [Act].

(b) An amendment to the declaration, bylaws, or plats and plans authorized by this section to be made under this [Act] must be adopted in conformity with [applicable law] and with the procedures and requirements specified by those instruments. If an amendment grants to any person any rights, powers, or privileges permitted by this [Act], all correlative obligations, liabilities, and restrictions in this [Act] also apply to that person.

COMMENT

EXAMPLE:

1. This section tracks closely the provisions of the Uniform Planned Community Act and the Model Real Estate Cooperative Act and provides a straightforward mechanism by which the documents of pre-Act common interest communities may be amended to take advantage of desirable provisions of the Act. See the comment to Section 1-205.

2. In considering the permissible amendments under Section 1-206, it is important to distinguish between the law governing the procedure for amending declarations, and the substance of the amendments themselves. An amendment to the declaration of a community created under "old" law, even if permissible under this Act, must nevertheless be adopted "in conformity with the procedures and requirements specified" by the original instruments, and in compliance with the old law.

Suppose an "old" condominium declaration and "old" state law both provide that approval by 100% of the unit owners is required to amend the declaration, but the unit owners wish to amend the declaration to provide for only 67% of the unit owners' approval of future amendments, as permitted by Section 2-117 of this Act. The amendment would not be valid unless 100% of the unit owners approved it, because of the procedural requirement of the declaration and "old" law. Once approved, however, only 67% would be required for subsequent amendments.

3. This section does not address the issue of contract rights of unit purchasers which may be affected by amendments under the new Act. Whether an amendment is effective against unit owners who purchased their units prior to the effective date of the Act and prior, therefore, to the

amendment in question is controlled by the contract and constitutional law of the State.

EXAMPLE:

Assume "old" state law required that 5% of the purchase price of each unit sold by a declarant must be held in escrow until all the common elements in the condominium are completed. Assume further that a declarant created a condominium under "old" law, sold 10 units to purchasers prior to the effective date of the Act, and now is holding 5% of the purchase prices for those 10 units in escrow, since the common elements are not yet completed. Immediately following the effective date of the Act, the declarant amends the declaration pursuant to Section 1-206 to provide that no escrow of any portion of the purchase price is required. The amendment is approved by the requisite votes—all held by declarant—but not by any of the 10 unit owners. On its face, the amendment would appear to comply with the provisions of this Act, since it accomplishes a result—no escrow—which is permitted by this Act and was not permitted by "old" law. Whether that amendment is effective, however, to either permit the declarant to terminate the escrow with respect to the 10 unit owners, or even to terminate the escrow scheme with respect to future unit owners (since the original 10 owners may reasonably have expected that 5% of all purchase prices would be held in escrow) is not addressed by this Act. That determination must be based on the contractual and constitutional rights of the original purchasers.

4. The last sentence of Section 1-206 addresses the potential problem of a declarant seeking to take undue advantage of the amendment provisions to assume a power granted by the Act without being subject to the Act's limitations on the power. The last sentence insures that, if declarants or other persons assume any of the powers and rights which the Act grants, the correlative obligations, liabilities, and restrictions of the Act also apply to that person, even if the amendment itself does not require that result.

EXAMPLE:

Assume that, pursuant to the provisions of "old" condominium law, a declarant may exercise control over the association for only 3 years from the date the condominium is created, but the control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, a provision in the declaration taking full advantage of the "old" law would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this Act is adopted. The declarant then properly amends the declaration pursuant to Section 1-206 to extend the period of declarant control for 5 years from the date of creation. The amendment would effectively extend control for 2 additional years, because Section 3-103(d) does not limit the number of the years the declarant may specify as a control period.

Nevertheless, if the declarant, before that extended time limit has expired, conveys 75 percent of the units that may ever be a part of the condominium, or fails for 2 years to exercise development rights or offer units for sale in the ordinary course of business, the period of declarant control would terminate by virtue of the limitations in Section 3-103(d). That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the provision in the "old" law permitting such a restriction.

5. In place of the words "declaration, bylaws, and plats and plans", at the end of this Section, each state should insert the appropriate terminology for those documents under the present state law, e.g. "master deed, rules and regulations", etc.

6. This section does not permit a pre-existing common interest community to elect to come entirely within the provisions of the Act, disregarding old law. However, the owners of a pre-existing common interest community may elect to terminate the community under pre-existing law and create a new community which would be subject to all the provisions of this Act.

§ 1-207. Applicability to Nonresidential Planned Communities

This [Act] does not apply to a planned community in which all units are restricted exclusively to nonresidential use unless the declaration provides that

the [Act] does apply to that planned community. This [Act] applies to a planned community containing both units that are restricted exclusively to nonresidential use and other units that are not so restricted, only if the declaration so provides or the real estate comprising the units that may be used for residential purposes would be a planned community in the absence of the units that may not be used for residential purposes.

COMMENT

This section provides a choice for non-residential planned communities to opt out of the Act altogether. "Mixed use" projects, on the other hand, are subject to this Act even in the absence of words to that effect in the declara-

tion if the residential portion would, in the absence of the nonresidential portion, constitute of itself a "planned community" within the meaning of this Act.

§ 1-208. Applicability to Out-of-state Common Interest Communities

This [Act] does not apply to common interest communities or units located outside this State, but the public offering statement provisions (Sections 4-102 through 4-105) apply to all contracts for the disposition thereof signed in this State by any party unless exempt under Section 4-101(b) ~~and the agency regulation provisions under Article 5 apply to any offering thereof in this State.~~

COMMENT

This section reflects the fact that there are practical as well as constitutional limits regarding the extent to which a state should or may extend its jurisdiction to out of state transactions. A state may, of course, properly exercise its authority to protect its citizens from false or misleading information regarding common interest communities located in other states but

not if the residential portion would, in the absence of the nonresidential portion, constitute of itself a "planned community" within the meaning of this Act.

ARTICLE 2

CREATION, ALTERATION, AND TERMINATION OF COMMON INTEREST COMMUNITIES

§ 2-101. Creation of Common Interest Communities

(a) A common interest community may be created pursuant to this [Act] only by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association. The declaration must be recorded in every [county] in which any portion of the common interest community is located and must be indexed [in the grantee's index] in the name of the common interest community and [in the grantor's index] in the name of each person executing the declaration.

(b) In a condominium, a declaration, or an amendment to a declaration, adding units may not be recorded unless (1) all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an independent [registered] engineer, surveyor, or architect ~~or (2) unless the agency has approved the declaration or amendment in the manner prescribed in Section 5-303(b).~~

COMMENT

1. Under subsection (a), a common interest community is created pursuant to this Act only by recording a decla-

ration. As with any instrument affecting real estate, the declaration must be recorded in every recording district in

which any portion of the common interest community is located and must be indexed in the manner described in subsection (a). Specific indexing rules are suggested in brackets and should be used in those states where this result would not otherwise occur. For example, the declaration commonly has not been indexed in the grantee's index in the name of the common interest community. Moreover, when multiple persons execute the declaration, the declaration has often been indexed solely in the name of the declarant and not in the name, for example, of lenders and other persons who might have executed the declaration. Because it is important that the names of the association and all persons executing the declaration appear in the index in order to locate all instruments in the land records, that language is not included in brackets.

In the case of a cooperative, there is a second requirement for creation in addition to the recording requirements applicable to all common interest communities discussed above. The declarant must convey the real estate subject to that declaration to the association, since the association (in the form of a corporation, trust or other entity described in Section 3-101) must hold title to that real estate. This requirement may contrast with the current practice in some jurisdictions under which the declarant may retain title to the real estate until proprietary leases for all or most units have been executed. This requirement tracks the language of the Model Real Estate Cooperative Act.

2. In Section 1-103, the Act defines the term "Declaration" as any instruments, however denominated, which create a common interest community, including any amendments to those instruments; "common interest community" in turn is defined as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration. "Ownership of a unit" does not include "holding a leasehold interest of less than 20 years in a unit, including renewal options." It is important to realize that other covenants, conditions, or restrictions applicable to the real estate in the common interest community might be recorded before or after the instruments are recorded which divide the real estate into units and common elements. Until the actual recording of the document which accomplished that

result, however, the common interest community has not been created.

3. A common interest community has not been lawfully created unless the requirements of this section have been complied with. Nevertheless, a project which meets the definition of a "common interest community" in Section 1-103(7) is subject to this Act even if this or other sections of the Act have not been complied with.

4. Mortgagees and other lienholders need not execute the declaration, and foreclosure of a mortgage or other lien will not, of itself, terminate a condominium or planned community. However, if that lien is prior to the declaration itself, the lienholder may exclude that real estate from the condominium or planned community. See Sections 2-118(k) and (l). Moreover, the declarant may wish to obtain agreements from mortgagees or other lienholders that they will give partial releases permitting lien-free conveyance of condominium or planned community units. See Section 4-111(a).

5. Except when development proceeds pursuant to Section 5-103, this Act contemplates that substantial completion must be reached before a unit may be conveyed. See Section 4-120. In the case of a condominium, substantial structural completion is also required before the condominium is created. The purpose of imposing these requirements is to insure that a purchaser will in fact take title to a unit which may be used for its intended purpose.

If a condominium were said to consist from the beginning of a certain number of units, even though some of those units had not yet been completed or even begun, serious problems would arise if the remaining units were never constructed and if no obligation to complete the construction could be enforced against any solvent person. If the insolvent owner of the unbuild units failed to pay his common expense assessments, for example, the unit owners' association might be left with no remedy except a lien of doubtful value against mere cubicles of airspace. Moreover, votes in the unit owners' association could be assigned to units, and those votes could be cast, even though the units were never built. The Act, therefore, requires that significant construction take place before units are assigned an interest in the common elements, a vote in the association, and a share of the common expense liabilities, and before units are conveyed. This requirement of substantial structural and mechanical com-

pletion (or the alternative bonding procedure and other assurances required by Section 5-103) reduces the possibility that a failure to complete will upset the expectations of purchasers or otherwise harm their interests in case the declarant becomes insolvent and no solvent person has the obligation to complete the unit.

6. In the case of a condominium, Section 2-101(b) requires that "all structural components and mechanical systems of all buildings containing or comprising any units" which will be created by recording a declaration, must be substantially completed in accordance with the plans. The intent of subsection (b) is that if any buildings are depicted on the plats and plans which are required by Section 2-109, and these buildings contain or comprise spaces which become units by virtue of recording the declaration, the structural components and mechanical systems of these buildings must be substantially complete before the declaration is recorded. This is required even though the plats and plans recorded pursuant to Section 2-109 depict only the boundaries of the buildings and the units created in those buildings, and not the structural components or mechanical systems (which need not be shown). If the boundaries of units are not depicted, of course, then no units are created. If the declarant fails to comply with this section, title is not affected. See comment 8, below.

The concept of "structural components and mechanical systems" is one commonly understood in the construction field and this comment is not intended as a comprehensive list of those components. For example, however, the term "structural components" is generally understood to include those portions of a building necessary to keep any part of the building from collapsing, and to maintain the building in a weather tight condition. This would include the foundations, bearing walls and columns, exterior walls, roof, floors and similar components. It would clearly not include such components as interior non-bearing partitions, surface finishes, interior doors, carpeting and the like. Similarly, typical examples of "mechanical systems" include the plumbing, heating, air conditioning and other like systems. Whether or not "electrical systems" are included within the meaning of the term depends on local practice.

7. Section 4-120 requires that, before an individual unit is conveyed, the unit must be "substantially completed."

"Substantial completion" is a well understood term in the construction industry. For example, the American Institute of Architects Document A 201, General Conditions of the Contract for Construction (1970 Ed.) at para. 8.1.3, states:

The Date of Substantial Completion of the Work . . . is the date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents (that is, the owner-contractor agreement, the conditions of the contract, and the specifications and all addenda and modifications), so the Owner can occupy or utilize the Work . . . for the use for which it is intended.

This standard is also one often used by building officials in issuing certificates of occupancy. It does not suggest that the unit is "entirely completed" as that term is understood in the construction industry; lesser details, such as sticking doors, banking windows, or some decorative items, might still remain, and the Act contemplates that they need not be completed prior to lawful conveyance.

8. Sections 2-101(b) and 4-120 require that completion certificates be recorded, or local certificates of occupancy be issued, as evidence of the fact that the required levels of construction have been met. In the case of "substantial completion," issuance of "a certificate of occupancy authorized by law," as is commonly required by local ordinance or state building codes, will suffice. Once the certificates have been recorded or issued, as the case may be, good title to the units may be conveyed in reliance on the record. It is possible, of course, that the declarant may have failed to complete the required levels of construction; no certificate of completion may have been filed or the architect, surveyor or engineer (whichever is appropriate in a particular jurisdiction) may have filed a false certificate. Such acts would create a cause of action in the purchaser under section 4-117, but would not affect the validity of the purchaser's title to the unit.

9. The requirement of "substantial completion" does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units may ultimately be located have been "structurally" completed, the declarant may create a condominium in which he reserves particular development rights (Section 2-105(a)(3)). In such a project, only the completed

units might be treated as units from the outset, and the development rights could be reserved to create additional units, either by adding additional real estate and units to the condominium, or by subdividing units previously created. The optional units may ever be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created.

10. Requiring "substantial completion" of the structural components and mechanical systems in the buildings constituting or comprising the units in a condominium may encourage creation of more phased condominiums under Section 2-105 in projects which were once in fact built in phases, but under a single non-expandable declaration. Experience in the several states where significantly more rigorous requirements are imposed by statute, however, has shown that this does not create a difficult situation either for the developer or lender. Moreover, it appears likely that the size of the initial phase of a multi-building project will be dictated largely by economics, as occurs in most jurisdictions today, rather than this Act. Finally, many lenders and developers are increasingly sensi-

tive to the secondary mortgage market requirements, particularly those of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC). Experience indicates that the pre-sale requirements imposed by FNMA and FHLMC frequently dictate that multi-building projects be structured on a phased or expandable basis.

11. The requirement of completion would be irrelevant in some types of common interest communities, such as campsite condominiums or some subdivision planned unit developments where the units might consist of unimproved lots and the airspace above them, within which each purchaser would be free to construct or not construct a residence. Any residence actually constructed would ordinarily become a part of the "unit" by the doctrine of fixtures, but nothing in this Act would require any residence to be built before the lots could be treated as units.

12. The term "independent" architect, surveyor or engineer in subsection (5) and elsewhere in the Act distinguishes any such professional person who acts as an independent contractor in his relationship to the declarant or lender.

§ 2-102. Unit Boundaries

Except as provided by the declaration:

(1) If walls, floors, or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.

(2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

(3) Subject to paragraph (2), all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.

(4) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

COMMENT

1. It is important for title purposes, for purposes of defining maintenance responsibilities, and for other reasons to have a clear guide as to which parts of a common interest community constitute the units and which parts con-

stitute common elements. This Section fills the gap left when the declaration merely defines unit boundaries in terms of floors, ceilings and perimeter walls, and is particularly useful in the case of cooperatives, in which the recording of plats and plans is not required. See Section 2-105(n)(5).

The provisions of this section may be varied, of course, to the extent that the declarant wishes to modify the details for a particular common interest community.

For example, in a townhouse project structured as a condominium or planned community, it may be desirable that the unit boundaries constitute the exterior surfaces of the roof and exterior walls, with the center line of the party walls constituting the perimeter boundaries of the units in that plane, and the undersurface of the bottom slab dividing the unit itself from the underlying land. Alternately, the boundaries of the units at the party walls might be extended to include actual division of underlying land itself. In these cases it would be inappropriate for walls, floors and ceilings to be designated as boundaries, and the declaration would describe the boundaries in the above manner.

2. The differentiations made clear here, in conjunction with the provisions of Section 3-107, will assist in minimizing disputes which have historically arisen in association administration with respect to liability for repair of such things as pipes, porches, and other components of a building which unit owners may expect the association to pay for and which the association may wish to have repaired by unit owners. Problems which may arise as a result of negligence in the use of

components—such as stoops and pipes—are resolved by Section 3-107, which imposes liability on a unit owner who causes damage to common elements, or under the broader provisions of Section 3-115(e), which permits the association to assess common expenses "caused by the misconduct of any unit owner" exclusively against that person. This would include, of course, not only damages to common elements, but fines or unusual service fees, such as clean-up costs, incurred as a result of the unit owner's misuse of the common elements.

3. The differentiation between components constituting common elements and components which are part of the unit is particularly important in light of Section 3-107(n), which (subject to the exceptions therein mentioned) makes the association responsible for upkeep of common elements and each unit owner individually responsible for upkeep of his unit.

4. The differentiation between unit components and common element components may or may not be important for insurance purposes under the Act. While the common elements in a project must always be insured, the units themselves need not be insured by the Association unless the project contains units divided by horizontal boundaries. See Section 3-113(a) and (b). In a "high-rise" configuration, however, Section 3-113(a) contemplates that both will normally be insured by the association (exclusive of improvements and betterments in individual units) and that the cost of such insurance will be a common expense. That common expense may be allocated, however, on the basis of risk if the declaration so requires. See Section 3-115(e)(3).

§ 2-103. Construction and Validity of Declaration and Bylaws

(a) All provisions of the declaration and bylaws are severable.

(b) The rule against perpetuities does not apply to defeat any provision of the declaration, bylaws, rules, or regulations adopted pursuant to Section 3-102(n)(1).

(c) In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this [Act].

(d) Title to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this [Act]. Whether a substantial failure impairs marketability is not affected by this [Act].

COMMENT

1. Subsection (b) does not totally invalidate the rule against perpetuities as applied to common interest communities. The language does provide that the rule against perpetuities is ineffective as to documents which govern the common interest community during the entire life of the project, regard-

less how long that should be. With respect to deeds or devises of units, however, the policies underlying the rule against perpetuities continue to have validity and remain applicable under this Act.

2. In considering the effect of failures to comply with this Act on title matters, subsection (a) refers only to defects in the declaration—which includes the plats and plans in the case of condominiums and planned communities—because the declaration is the instrument which creates and defines the units and common elements. No reference is made to other instruments, such as bylaws, because these instruments have no impact on title, whether or not recorded. However, in all cases of violations of the Act, a failure of the bylaws—or any other instrument—to comply with the Act, would entitle any affected person to appropriate relief under Section 4-117.

3. No special prohibition against racial or other forms of discrimination is included in this Act because the provisions of generally applicable state and federal law apply as much to common interest communities as to other forms of real estate.

4. Some examples may help to clarify what sort of defects in the declaration are to be regarded as "insubstantial" within the meaning of the first sentence of subsection (d).

Suppose the declaration allocates common element interests to all the units, but fails to indicate the formula for the allocation as required by Section 2-107. This would be a substantial defect if the assigned interests were unequal, but if all units were as-

signed identical interests it would be possible to infer that the basis of the allocation was equality—and the failure of the declaration to say so would be an insubstantial defect. Were this to happen in a common interest community where the right to add new units is reserved, however, it should be noted that a subsequent amendment to the declaration adding new units could not use any formula other than equality for reallocating the common elements interests unless a different formula were specified pursuant to Section 2-107(c).

Other examples of insubstantial defects that might occur include failure of the declaration to include the word "condominium", "cooperative", or "planned community", as required by Section 2-105(a)(1), or failure of the plats or plans in the case of condominium and planned communities, to comply satisfactorily with the requirement of section 2-109(a) that they be "clear and legible," so long as they can at least be deciphered by persons with proper expertise. Failure to organize the unit owners' association at the time specified in Section 3-101 would not be a defect in the declaration at all, and would not affect the validity or marketability of titles in the common interest community. It would, however be a violation of this Act, and create a claim for relief under Section 4-117.

5. Each state has case or statutory law dealing with marketability of titles, and the question of whether substantial failures of the declaration to comply with the Act affects marketability of title should be determined by that law and not by this Act.

ult, it will not be necessary under this Act to continue the practice, common in some jurisdictions, of describing in the instrument conveying title to a unit the common element interests, or limit-

ed common elements, that are appurtenant to that unit or make reference to surveys or subsequent amendments to declarations.

§ 2-105. Contents of Declaration

(a) The declaration must contain:

(1) the names of the common interest community and the association and a statement that the common interest community is either a condominium, cooperative, or planned community;

(2) the name of every [county] in which any part of the common interest community is situated;

(3) a legally sufficient description of the real estate included in the common interest community;

(4) a statement of the maximum number of units that the declarant reserves the right to create;

(5) in a condominium or planned community, a description of the boundaries of each unit created by the declaration, including the unit's identifying number or, in a cooperative, a description, which may be by plats or plans, of each unit created by the declaration, including the unit's identifying number, its size or number of rooms, and its location within a building if it is within a building containing more than one unit;

(6) a description of any limited common elements, other than those specified in Section 2-102(2) and (4), as provided in Section 2-100(b)(10) and, in a planned community, any real estate that is or must become common elements;

(7) a description of any real estate, except real estate subject to development rights, that may be allocated subsequently as limited common elements, other than limited common elements specified in Section 2-102(2) and (4), together with a statement that ~~they~~ may be so allocated; *the designated real estate*

(8) a description of any development rights (Section 1-103(14)) and other special declarant rights (Section 1-103(29)) reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;

(9) if any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with (i) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right or a statement that no assurances are made in those regards, and (ii) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

(10) any other conditions or limitations under which the rights described in paragraph (8) may be exercised or will lapse;

(11) an allocation to each unit of the allocated interests in the manner described in Section 2-107;

(12) any restrictions (i) on use, occupancy, and alienation of the units, and (ii) on the amount for which a unit may be sold or on the amount that may be received by a unit owner on sale, condemnation, or casualty loss to the unit or to the common interest community, or on termination of the common interest community;

(13) the [recording data] for recorded encumbrances and licenses appurtenant to or included in the common interest community or to which any portion of the common interest community is or may become subject by virtue of a reservation in the declaration; and

§ 2-104. Description of Units

A description of a unit which sets forth the name of the common interest community, the [recording data] for the declaration, the [county] in which the common interest community is located, and the identifying number of the unit, is a legally sufficient description of that unit and all rights, obligations, and interests appurtenant to that unit which were created by the declaration or bylaws.

COMMENT

1. The intent of this section is that no description of a unit in a deed, lease, deed of trust, mortgage, or any other instrument or document shall be subject to challenge for failure to meet any common law or other requirements, so long as the requirements of this section are satisfied, and so long

as the declaration itself, together with the plats and plans which are a part of the declaration, provides a legally sufficient description.

2. The last sentence makes clear that an instrument which does meet those requirements includes all interests appurtenant to the unit. As a re-

(14) all matters required by Sections 2-100, 2-107, 2-108, 2-109, 2-115, 2-116, and 3-103(d).

(h) The declaration may contain any other matters the declarant considers appropriate.

COMMENT

1. Many statutes and other regulatory schemes in the multi-owner project field do not separate the functions of a recorded declaration and an unrecorded public offering statement or disclosure documents. As a result, many of the developer's representations and assurances concerning his future plans must appear in the declaration as well as the public offering statement, even though they have nothing to do with the legal structure or title of the project. This results in duplicative requirements and unnecessarily complex declarations.

This Act makes a functional distinction between the declaration and the public offering statement. It only requires the declaration to contain those matters which affect the legal structure or title of the common interest community. This includes the reserved powers of the declarant to exercise development rights within the common interest community. A narrative description of those rights, however, and the possible consequences flowing from their exercise, are required to be disclosed only in the public offering statement and not in the declaration.

In the case of condominiums and planned communities, plats and plans are made part of the declaration by Section 2-100, and their content may in part provide some of the information required by this section.

2. This section requires a statement of the name of the association for the common interest community itself, in order that the declaration may be indexed in the name of the association. See Section 2-101.

3. The Act requires that the declaration for a common interest community situated in two or more recording districts be recorded in each of those districts. While the bracketed language refers to the "county" as the recording district in which the declaration is to be recorded, in states where recording is done at the city, town or parish level the bracketed language should be amended accordingly.

Paragraph (a)(4) requires the declarant to state the largest number of units he reserves the right to build. This Act imposes no time limit, measured by an absolute number of years, at the expiration of which the declarant must relinquish control of the as-

sociation. Instead, declarant control ends when 75% of the maximum number of units which may be created by the declarant have been sold, or at the end of a 2-year period during which development is not proceeding. See Section 3-103(d). The flexibility afforded by this section may be important to a declarant as he responds to unanticipated future changes in his market.

In theory, a declarant might overstate the maximum number of units in an attempt to artificially extend the period of declarant control, since the time might never come when a declarant had sold 75% of that number of units. As a practical matter, however, as the following example points out, such a practice would not likely achieve long-term control.

EXAMPLE:

A declarant reserves the right to build 100 units, even though zoning would permit only 75 units on the site, and the declarant actually plans on building only 50 units. As a result of the reservation, the declarant would not lose control of the association under the 75% rule stated in Section 3-103(d)(i) even when all 50 units had been built and sold, because that percentage applies to all potential units, not units actually built. See Section 3-103(d)(i).

However, there are practical constraints on the declarant's decision in this matter. Substantial exaggeration of the future density of the development might tend to impede sales of units in that project. Moreover, such a statement might also produce negative governmental reaction to proposals which might require local approval.

Even if the declarant did overstate the number of units to retain control, however, other limitations imposed by Section 3-103(d) will require turnover at an appropriate time. In the example, once the declarant had exercised the right to add the last of the 50 units which he intended to build, the 2 year period imposed by Section 3-103(d)(ii) and (iii) would begin to run and the declarant would lose the right to control the association 2 years from the time the last units were added, even though he had reserved the right to add more units.

5. Paragraph (a)(5) requires that the boundaries of each unit created by the declaration be identified. The words "created by the declaration" emphasize that, in an expandable project, new units may be created in the future by amendments to the declaration. Until those new units are actually added to the project by amending the declaration, however, they are not units within the meaning of that defined term, and they need not be described.

6. Section 2-102 makes it possible in many condominiums or planned communities to satisfy paragraph (a)(5) of this section, by merely providing the identifying number of units and stating that each unit is bounded by its ceiling, floor, and walls. The plats and plans will show where those ceilings, floors and walls are located, and Section 2-102 provides all other details, except to the extent the declaration may make additional or contradictory specifications because of the unique nature of the project.

In the case of many cooperatives, it is possible to satisfy paragraph (a)(5) of this section by merely providing the identifying number of the unit, the size of the unit in square feet or its number of rooms, and its location within a building if it is in a building containing more than one unit. Thus, for example it would be possible to describe a cooperative unit as follows: "Unit Number 213, consisting of 800 square feet, located on the fourth floor of Building A."

7. Paragraph (a)(6) makes clear that the limited common elements described in Section 2-102(2) and (4) need not be described in the declaration. These limited common elements are typically porches, balconies, patios, or other amenities which may be included in a project. Such improvements are treated by the Act as limited common elements, rather than either common elements or parts of units, in order to minimize the attention which the documents need to give them, and to secure the result that would be desired in the usual case. Thus, if these improvements remain limited common elements, and no special provisions concerning them are included in the declaration, they may be used only by the units to which they are physically attached; maintenance of those improvements must be paid for by the association; and such improvements need not be specifically referred to in the declaration. In the case of all common interest communities, except cooperatives, porches, balconies and patios must be shown on the plats

and plans (See Section 2-109(b)(10)), but other limited common elements described in Section 2-102(2) and (4) need not be shown.

8. Paragraph (a)(7) contemplates that the common elements in the project may be allocated as limited common elements at some future time, either by the declarant or the association. For example, a swimming pool might serve an entire project during early phases of development. At the outset that pool might be a common element which all the unit owners may use. At a later time, with more units and additional pools built in subsequent phases, either the declarant or the association might determine that the first pool should become a limited common element reserved for the use only of units in the first phase, while the other pools should be reserved exclusively for units in the subsequent phases. Such a potential allocation should be described in the declaration pursuant to this section. The method of subsequent allocation is discussed in Section 2-108.

9. Paragraph (a)(8) requires that the declaration describe all development rights and other special declarant rights which the declarant reserves. The declaration must describe the real estate to which each right applies, and state the time limit within which each of those rights must be exercised. The Act imposes no maximum time limit for the exercise of those rights, and contemplates that those rights may be exercised after the period of declarant control terminates.

10. Paragraph (a)(12)(ii) includes certain requirements which were not originally applicable to condominiums and planned communities under UCA and UPCA, respectively. Tracking MIRECA, paragraph (a)(12)(ii) requires the declaration to include any information which restricts the amount for which a unit may be sold, or the amount to be received by a unit owner upon sale, condemnation or casualty loss. Such restrictions are increasingly common in the development of "limited equity" common interest communities or common interest communities which are designed to minimize the increased value of the common interest community upon resale in order to preserve housing for a particular income group. The Act in no way restricts the use of such provisions, but does require that explicit provisions concerning such restrictions appear in both the declaration and the Public Offering Statement.

11. Paragraph (a)(14) is a cross-reference to other sections of the Act which require the declaration to contain particular matters. Some of these sections, such as 2-107 on the allocation of allocated interests, will affect all projects. Others, such as 2-100 on leasehold common interest communities, will apply only to particular lands of projects.

12. Subsection (b) contemplates that, in addition to the content re-

quired by subsection (a), other matters may also be included in the declaration if the declarant or lender feel they are appropriate to the particular project. In particular, the draftsman should carefully consider any desired provisions which would vary any of the many sections of the Act where variation is permitted, including such matters as expanding or restricting the association's powers.

2. Subsection (a)(1) provides alternative bracketed language which should be considered by each state based on its practice. In any state where the recording acts do not specify the essential terms which must be included in a memorandum of lease, either this section should be supplemented to specify the essential terms, or the bracketed language relating to such memoranda should be deleted.

3. This section sets out requirements concerning leasehold common interest communities which are not typically contained in the laws of most states. In particular, it requires that the declaration describe the rights of the unit owners, or state that they have no rights concerning a variety of significant matters. This section also contains a number of other consumer protection provisions. However, in contrast to the result under some states' condominium laws, neither the unit owners or the association have a statutory right to renewal of a lease upon termination.

4. In the case of leasehold condominiums and planned communities, the most significant matter of consumer protection in this section is subsection (b), which provides that unit owners who pay their share of the rent of the underlying lease may not be deprived of their enjoyment of the leasehold premises.

Subsection (b) is intended to protect the leasehold condominium or planned community "unit owner" regardless of whether he is a lessee, sublessee, or even further down in a chain of transfer of leasehold interests. See Section 1-103(32). Thus, for example, if the "unit owner" is a sublessee, the term "lessor (or) his successor in interest" includes not only the lessor, but also the lessee.

Subsection (b) further protects the unit owner by assuring that he will not share with his fellow unit owners any collective obligations toward their common lessor. All obligations are instead fractionalized so that no unit owner can be made liable or otherwise penalized for a default by any of his fellows. Thus, a default by the association in payment of the rent due to a lessor, in a case where the lease of common elements ran to the association, would not permit the lessor to terminate continued use of those common elements by those unit owners who then pay their share of the rent.

Subsection (b) does not address the issue of whether a unit owner's tenant

may cure a default by the unit owner under the unit owner's lease so as to prevent termination of the unit owner's lease.

EXAMPLE:

Assume that A leases 100 acres of land to B for 50 years. B, in turn, leases the same 100 acres to C, for the duration of the 50 year term. C creates a condominium on the leasehold land, and thereby becomes the declarant; thereafter, C leases a unit in the condominium to D, together with a lease of this allocated undivided interest in the leasehold underlying the unit, for the duration of the 50 year term. D then leases his unit to E for a term of 5 years.

Both A and B must execute the declaration; see Section 2-106(a). So long as D meets his obligations to C—or any other persons—under the declaration and his sublease, D's interest in the leasehold may not be terminated by either A, B or C; see Section 2-106. For that reason, A and B will likely take appropriate steps to protect their interests in the event that D makes timely payment to C, if called for in the declaration or lease, but C fails to meet his obligations to either A or B. If D fails to make timely payment to C—or to B or A if those persons have so required—then D's interest may be terminated by the person entitled to payment, unless E is entitled to cure. E may cure and thereby prevent default, however, only if other law of the state permits transferees of partial interests to cure defaults of his transferor. Since E is not a unit owner, he is not entitled to rights under this Act.

However, this section does not permit a unit owner in a cooperative to preserve his interest in the cooperative by paying his pro-rata share of the rent in the event the association fails to pay rent due under a ground lease. This distinction flows from the differences in the nature of a cooperative and a condominium or a planned community, and it tracks the distinction made by UCA and UPCA, and MRECA.

5. Subsection (d) considers the problems created when termination of a lease reduces the size of a common interest community. In the event that some units are thereby withdrawn from the common interest community, reallocation of the allocated interests would be required; the section describes how that reallocation would occur.

§ 2-106. Leasehold Common Interest Communities

(a) Any lease the expiration or termination of which may terminate the common interest community or reduce its size [, or a memorandum thereof,] must be recorded. Every lessor of those leases in a condominium or planned community shall sign the declaration. The declaration must state:

(1) the [recording data] for the lease [or a statement of where the complete lease may be inspected];

(2) the date on which the lease is scheduled to expire;

(3) a legally sufficient description of the real estate subject to the lease;

(4) any right of the unit owners to redeem the reversion and the manner whereby those rights may be exercised, or a statement that they do not have those rights;

(5) any right of the unit owners to remove any improvements within a reasonable time after the expiration or termination of the lease, or a statement that they do not have those rights; and

(6) any rights of the unit owners to renew the lease and the conditions of any renewal, or a statement that they do not have those rights.

(b) After the declaration for a leasehold condominium or leasehold planned community is recorded, neither the lessor nor the lessor's successor in interest may terminate the leasehold interest of a unit owner who makes timely payment of a unit owner's share of the rent and otherwise complies with all covenants which, if violated, would entitle the lessor to terminate the lease. A unit owner's leasehold interest in a condominium or planned community is not affected by failure of any other person to pay rent or fulfill any other covenant.

(c) Acquisition of the leasehold interest of any unit owner by the owner of the reversion or remainder does not merge the leasehold and fee simple interests unless the leasehold interests of all unit owners subject to that reversion or remainder are acquired.

(d) If the expiration or termination of a lease decreases the number of units in a common interest community, the allocated interests must be reallocated in accordance with Section 1-107(a) as if those units had been taken by eminent domain. Reallocations must be confirmed by an amendment to the declaration prepared, executed, and recorded by the association.

COMMENT

1. Subsection (a) requires that the lessor of any lease in a condominium or planned community which, upon termination, will terminate the condominium or planned community or reduce its size, must sign the declaration. This requirement insures that the lessor has consented to use of his land as a con-

dominium or planned community. Note that such a signature is not required in the case of a lease in a cooperative. This distinction between the types of common interest communities tracks that made by UCA, UPCA and MRECA.

§ 2-107. Allocation of Allocated Interests

(a) The declaration must allocate to each unit:

(i) in a condominium, a fraction or percentage of undivided interests in the common elements and in the common expenses of the association (Section 3-115(n)), and a portion of the votes in the association;

(ii) in a cooperative, an ownership interest in the association, a fraction or percentage of the common expenses of the association (Section 3-115(n)), and a portion of the votes in the association; and

(iii) in a planned community, a fraction or percentage of the common expenses of the association (Section 3-115(a)), and a portion of the votes in the association.

(b) The declaration must state the formulas used to establish allocations of interests. Those allocations may not discriminate in favor of units owned by the declarant or an affiliate of the declarant.

(c) If units may be added to or withdrawn from the common interest community, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the common interest community after the addition or withdrawal.

(d) The declaration may provide: (i) that different allocations of votes shall be made to the units on particular matters specified in the declaration; (ii) for cumulative voting only for the purpose of electing members of the executive board; and (iii) for class voting on specified issues affecting the class. If necessary to protect valid interests of the class, a declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by this [Act] nor may units constitute a class because they are owned by a declarant.

(e) Except for minor variations due to rounding, the sum of the common expense liabilities and, in a condominium, the sum of the undivided interests in the common elements allocated at any time to all the units must each equal one if stated as a fraction or 100 percent if stated as a percentage. In the event of discrepancy between an allocated interest and the result derived from application of the pertinent formula, the allocated interest prevails.

(f) In a condominium, the common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void.

(g) In a cooperative, any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an ownership interest in the association made without the possessory interest in the unit to which that interest is related is void.

COMMENT

1. Subsection (a) treats allocated interests differently in each type of common interest community. The distinctions made in parts (i)-(iii) track those made in the corresponding subsection of UCA, UPCA and MRECA, for condominiums, planned communities, and cooperatives, respectively.

2. Most existing condominium statutes and cooperative documents require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, or ownership interests in cooperatives, votes in the association and common expense liabilities. Following UCA, UPCA, and MRECA, this Act

departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, a common interest community's applicable allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the value of those units. Moreover, "size" might be used, for example, in allocating common expenses and common element interests (or ownership interests), while equality is used in allocating votes in the association. This section does not require that the

formulas used by the declarant be justified, but it does require that the formulas be explained. The sole restriction on the formulas to be used in these allocations is that they not discriminate in favor of the units owned by the declarant. Otherwise, each of the separate allocations may be on any basis which the declarant chooses, and none of the allocations need be tied to any other allocation.

3. While the flexibility permitted in allocations is broader than that commonly used today, it is likely that the traditional bases for allocation will continue to be used, and that the allocation for all allocated interests will often be based on the same formulas. Most commonly, those bases include size, equality, or value of units. Each of these is discussed below.

1. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices he has made and explain the formula he has chosen.

5. Most existing condominium statutes require that "value" be used as the basis of all allocations. Under this Act a declarant is free to select such a basis if he wishes to do so. For example, he might designate the "par value" of each unit as a stated number of dollars or points. However, the formula used to develop the par values of the various units would have to be explained in the declaration. For example, the declaration for a high rise project might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels. The formula for determining area in this example could be further refined in the manner suggested in comment 4, above, and any other factors (such as the direction in which a unit faces) could also be given weight so long as the weight given to each factor is explained in the declaration.

6. The purpose of subsection (c) is to require a comprehensive scheme for reallocation of allocated interests in a common interest community subject to development rights, and afford some advance disclosure to purchasers of units in the first phase of an expandable common interest community of how

allocated interests will be reallocated if additional units are added.

7. Subsection (d) represents a significant departure from the practice in most states concerning the allocation of votes. The usual rule is that a single allocation of votes is made to each unit, and that allocation applies to all matters on which those votes may be cast. This section recognizes that the increasingly complex nature of some projects requires different allocations on particular questions. Different allocations may be appropriate, for example, in a project where common expense liabilities, or questions concerning rules and regulations, affect different units differently.

EXAMPLE:

In a mixed commercial and residential project, the declaration might provide that each unit owner would have an equal vote for the election of the Board of Directors. However, on matters concerning ratification of the common expense budget, where the commercial unit owners pay a much larger share than their proportion of the total units, the vote of commercial unit owners might be increased so that they exceed the number of votes the residential owners hold. Alternatively, of course, it might be possible to treat this question as a class voting matter, but the draftsman is provided flexibility in this section to choose the most appropriate solution.

8. This section recognizes that there may be certain instances in which class voting in the association would be desirable. For example, in a mixed-use planned community or condominium consisting of both residential and commercial units, there may be certain kinds of issues upon which the residential or commercial unit owners should have a special voice, and the device described in Comment 7 is not desired. To prevent abuse of class voting by the declarant, subsection (d) permits class voting only with respect to specified issues directly affecting the designated class and only insofar as necessary to protect valid interests of the designated class.

EXAMPLE:

Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting only the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units.

The subsection further provides that the declarant may not use the class voting device for the purpose of evading any limitation imposed on declarants by this Act (e.g., to maintain declarant control beyond the period permitted by Section 3-103.)

10. The last clause of subsection (d) prohibits a practice common in planned communities, where units owned by declarant constitute a separate class of units for voting and other

purposes. Upon transfer of title, those units lose these more favorable voting rights. This section makes clear that the votes and other attributes of ownership of a unit may not change by virtue of the identity of the owner. The Act provides other, more balanced, devices for those circumstances which such classes were legitimately intended to address, principally declarant control of the association. See Section 3-103(d).

§ 2-108. Limited Common Elements

(a) Except for the limited common elements described in Section 2-102(2) and (4), the declaration must specify to which unit or units each limited common element is allocated. An allocation may not be altered without the consent of the unit owners whose units are affected.

(b) Except as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration executed by the unit owners between or among whose units the reallocation is made. The persons executing the amendment shall provide a copy thereof to the association, which shall record it. The amendment must be recorded in the names of the parties and the common interest community.

(c) A common element not previously allocated as a limited common element may be so allocated only pursuant to provisions in the declaration made in accordance with Section 2-105(a)(7). The allocations must be made by amendments to the declaration.

COMMENT

1. Like all other common elements, limited common elements are owned by the association. The use of a limited common element, however, is reserved to less than all of the unit owners. Unless the declaration provides otherwise, the association is responsible for the upkeep of a limited common element and the cost of such upkeep is assessed against all the units. See Sections 3-107(a) and 3-115(c)(1). This might include the costs of repainting all shutters or balconies, for example, which are limited common elements pursuant to Section 2-102(4). Accordingly, there may be occasions where, to meet the expectations of owners and to have costs borne directly by those who benefit from those amenities, the declaration might provide that the costs will be borne, not by all unit owners as part of their common expense assessments, but only by the owners to which the limited common elements are assigned.

2. The use of common elements which are not "limited" within the

meaning of this Act may nevertheless be restricted by the unit owners' association pursuant to the powers set forth in Section 3-102(a)(6) and (10), unless that power is limited in the declaration. For example, the association might assign reserved parking spaces to designated unit owners, or even to persons who are not unit owners. Such a parking space would differ from a limited common element in that its use would be merely a personal right of the person to whom it is assigned and this section would not have to be complied with to allocate it or to reallocate it.

3. Because a mortgage, deed of trust, or security interest may restrict the borrower's right to transfer the use of a limited common element without the lender's consent, the terms of the encumbrance should be examined to determine whether the lender's consent or release is needed to transfer that right of use to another person.

4. See also Comments 7 and 8 to Section 2-105.

§ 2-109. Plats and Plans

(a) Plats and plans are a part of the declaration, and are required for all common interest communities except cooperatives. Separate plats and plans are not required by this Act if all the information required by this section is contained in either a plat or plan. Each plat and plan must be clear and legible and contain a certification that the plat or plan contains all information required by this section.

(b) Each plat must show:

(1) the name and a survey or general schematic map of the entire common interest community;

(2) the location and dimensions of all real estate not subject to development rights, or subject only to the development right to withdraw, and the location and dimensions of all existing improvements within that real estate;

(3) a legally sufficient description of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;

(4) the extent of any encroachments by or upon any portion of the common interest community;

(5) to the extent feasible, a legally sufficient description of all easements serving or burdening any portion of the common interest community;

(6) the location and dimensions of any vertical unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

(7) the location with reference to an established datum of any horizontal unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

(8) a legally sufficient description of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";

(9) the distance between non-contiguous parcels of real estate comprising the common interest community;

decks (10) the location and dimensions of limited common elements, including porches, balconies and patios, other than parking spaces and the other limited common elements described in Sections 2-102(2) and (4);

(11) in the case of real estate not subject to development rights, all other matters customarily shown on land surveys.

(c) A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the common interest community. Any contemplated improvement shown must be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT".

(d) To the extent not shown or projected on the plats, plans of the units must show or project:

(1) the location and dimensions of the vertical boundaries of each unit, and that unit's identifying number;

(2) any horizontal unit boundaries, with reference to an established datum, and that unit's identifying number; and

(3) any units in which the declarant has reserved the right to create additional units or common elements (Section 2-110(c)), identified appropriately.

(e) Unless the declaration provides otherwise, the horizontal boundaries of part of a unit located outside a building have the same elevation as the horizontal boundaries of the inside part and need not be depicted on the plats and plans.

(f) Upon exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of subsections (a), (b), and (d), or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of those subsections.

(g) Any certification of a plat or plan required by this section or Section 2-103(b) must be made by an independent [registered] surveyor, architect, or engineer.

COMMENT

1. This section makes clear that plats and plans are a part of the declaration and are required for condominiums and planned communities, but not for cooperatives. That distinction tracks that made by UCA, UPCA, and MRECA.

2. The terms "plat" or "plan" have been given a variety of meanings by custom and usage in the various jurisdictions. Under this Act, it is important to recognize that a "plat" need not mean a "survey" of the entire real estate constituting a project at the time the initial plat is recorded, although through amendments to the plat as development proceeds, it ultimately becomes a survey of the entire project.

As to "plan," the Act does not use that term to mean the actual building plans used for construction of the project. Instead, the required content of the plans in this Act is described in subsection (d). Essentially, the plans constitute a boundary survey of each unit. Typically, the walls will be the vertical ("up and down" or "perimeter") boundaries, and the floors and ceilings will be the horizontal boundaries. Importantly, these boundaries need not be physically measured, but may instead be projected from the plat or from actual building construction plans. Thus, the plans under this Act are not conceived to be "as built" plans.

3. Subsection (c) permits, but does not require, the plats to show the location of contemplated improvements. Since construction of contemplated improvements by a declarant involves the exercise of development rights, a declarant may not create any improvement within real estate where no development rights have been reserved, unless the plats actually show that proposed improvement or unless the association (which the declarant may

control) makes the improvement pursuant to Section 3-102(n)(7). Of course, as to existing unit owners, the improvements which may be made by the declarant and the areas within which they may be made, are limited by his contract with those unit owners. Since this is true, the Declarant may not violate that contract directly—by undertaking improvements for which he reserved no rights—or indirectly by making improvements through the association which he controls or by seeking to amend the declaration in violation of the contract. Moreover, under Section 2-117(d), no amendment to the declaration may create or increase special declarant rights without the unanimous consent of the unit owners.

Within land subject to development rights construction may take place in accordance with the reserved rights, even if no contemplated improvements are shown on the plats. As to the declarant's obligation to complete an improvement that is shown, see Section 4-119(a).

4. As noted in the Comments to Section 2-101, a condominium or planned community unit may consist of unenclosed ground and/or airspace, with no "building" involved. If this were true of all units in a particular condominium, the provisions of Section 2-109 relating to plans (but not plats) would be inapplicable.

5. In detailing the required contents of the plats, two different types of legal description are contemplated. First, in subsection (b)(1), the plat must show at least a general schematic map of the entire project. While this may be by survey, the Act recognizes that a survey may be unduly expensive or impractical in a large project, and accordingly permits a general schematic map of the entire project at the commencement of development. With respect to those portions of the proj-

ect, however, where no future development may take place, the flexibility of a general schematic map is not permitted by the statute. As development ceases in particular phases, subsection (b)(2) contemplates that the locations and dimensions of that real estate will be identified. As this process continues, all of the real estate originally shown in a general schematic map will have been surveyed, and the location and dimensions of that real estate identified, at the expiration of development rights. In addition, subsection (2) contemplates that existing improvements must be shown within real estate where no further development will take place. This does not include take place. This does not include the units which may be within each building, but it does include the external physical dimensions of the buildings themselves. The nature of "existing improvements" required to be surveyed under subsection (2) should be determined by local practices in the particular state.

6. Subsection (f) describes the amendments to the plats and plans

which must be made as development rights are exercised. This section requires that the plats and plans be amended at each stage of development to reflect actual progress to date. If an original schematic map was recorded as permitted by subsection (b)(1), the survey required by (b)(2) would also constitute the amendments required by subsection (f).

7. The terms "horizontal" and "vertical" are now commonly understood to refer, respectively, to "upper and lower" and "lateral or perimeter." Thus, Section 2-102 contemplates that the perimeter walls may be designated as the "vertical" boundaries of a unit and the floor and ceiling as its "horizontal" boundaries. That is the sense in which the words "horizontal" and "vertical" are to be understood in this section and throughout this Act.

9. Sections 4-118 and 4-119 state the effect of labeling an improvement "MUST BE BUILT" or "NEED NOT BE BUILT," as required by subsection (b)(3).

§ 2-110. Exercise of Development Rights

(a) To exercise any development right reserved under Section 2-105(a)(8), the declarant shall prepare, execute, and record an amendment to the declaration (Section 2-117) and in a condominium or planned community comply with Section 2-109. The declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each new unit created, and, except in the case of subdivision or conversion of units described in subsection (b), reallocate the allocated interests among all units. The amendment must describe any common elements and any limited common elements thereby created and, in the case of limited common elements, designate the unit to which each is allocated to the extent required by Section 2-108 (Limited Common Elements).

(b) Development rights may be reserved within any real estate added to the common interest community if the amendment adding that real estate includes all matters required by Section 2-105 or 2-106, as the case may be, and, in a condominium or planned community, the plats and plans include all matters required by Section 2-109. This provision does not extend the time limit on the exercise of development rights imposed by the declaration pursuant to Section 2-105(a)(8).

(c) Whenever a declarant exercises a development right to subdivide or convert a unit previously created into additional units, common elements, or both;

(1) If the declarant converts the unit entirely to common elements, the amendment to the declaration must reallocate all the allocated interests of that unit among the other units as if that unit had been taken by eminent domain (Section 1-107); and

(2) If the declarant subdivides the unit into two or more units, whether or not any part of the unit is converted into common elements, the amendment to the declaration must reallocate all the allocated interests of the unit among the units created by the subdivision in any reasonable manner prescribed by the declarant.

(d) If the declaration provides, pursuant to Section 2-105(n)(8), that all or a portion of the real estate is subject to a right of withdrawal:

(1) If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, none of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and

(2) If any portion is subject to withdrawal, it may not be withdrawn after a unit in that portion has been conveyed to a purchaser.

COMMENT

1. This section generally describes the method by which any development right may be exercised. Importantly, while new development rights may be reserved within new real estate which is added to the common interest community, the original time limits on the exercise of these rights which the declarant must include in the original declaration may not be extended. Thus, the development process may continue only within the self-determined constraints originally described by the declarant.

2. The reservation and exercise of development rights is typically closely coordinated with financing for the project. As a result, lender review and control of that process is common, and the financing documents reflect the proposed development process.

A typical construction loan mortgage on a portion of a phased condominium or planned community might provide that as soon as that portion of land is added (or, if the portion is also designated withdrawable land, as soon thereafter as anyone other than the declarant becomes the unit owner of a unit in the withdrawable land) the mortgage on that land and on any buildings containing units built on that land before it was added converts into a mortgage on all of the units located within that portion, together in the case of a condominium, with their respective common element interests. In the case of a condominium, the common element interest of those units will, of course, extend to the common elements in other sections of the condominium. Therefore, conveyance of the units in that phase to the lender or to a purchaser at a foreclosure sale would automatically transfer all of those units' common element interest, as a result of the requirements of Sections 2-107(f) and 2-110(a).

3. A lender who holds a mortgage lien on one portion of a condominium or planned community may not cause that portion to be withdrawn from the condominium or planned community unless the portion constitutes withdrawable real estate in which there is no unit owner other than the declarant. Even then, except in the case of foreclosure, the amendment effectuating the withdrawal must be executed by the declarant.

Therefore, a lender may wish to require that an amendment withdrawing the portion on which he has a mortgage be executed by the declarant and placed in escrow at the time the loan is made in order to protect against a recalcitrant borrower. Alternatively, a lender after foreclosure under Section 2-118(k) may require an amendment from the association. Also a lender could itself execute the amendment if the lender buys in at a foreclosure sale or takes a deed in lieu of foreclosure and elects to become a declarant under Section 3-104(e) or (a).

4. As indicated in the Comments to Section 1-100, the withdrawal of real estate from a common interest community may constitute a subdivision of land under the applicable subdivision ordinance. Under most subdivision ordinances, the owner of the real estate is regarded as the "subdivider." In the event of a withdrawal under this section, however, the declarant is in fact the subdivider because of his unique interest in and control over the real estate, even though the real estate, for title purposes, is a common element until withdrawn. Accordingly, he would bear the cost of compliance with any subdivision ordinance required to withdraw a part of the real estate from the common interest community.

5. Subsection (c) deals with special problems surrounding allocated inter-

ests when the declarant subdivides or converts units which were originally created in the declaration into additional units, common elements or both. This development right permits the declarant to defer a final decision as to the size of certain units by permitting the subdivision of larger interior spaces into smaller units. The declarant may thus "build to suit" for purchasers' needs or to meet changing market demand.

For example, a declarant of a 5-story office building common interest community may have purchasers committed at the time of the filing of the common interest community declaration but a lack of purchasers for the upper 2 floors. In such a circumstance, the declarant could designate the upper 2 floors as a unit, reserving to himself the right to subdivide or convert that unit into additional units, common elements or a combination of units and common elements as needed to suit the requirements of ultimate purchasers.

If, at a later time, a purchaser wishes to purchase half of one floor as a unit, the declarant could exercise the development right to subdivide his 2-floor unit into 2 or more units. He may also wish to reserve a portion of the divided floor as a corridor which

will constitute common elements. In that case, he would proceed pursuant to this subsection to reallocate the allocated interests among the units in the manner described in this section.

Alternatively, the declarant may ultimately decide that the entire 2 floors should be turned over to the unit owners' association not as a unit but as common elements to be used perhaps as a cafeteria serving the balance of the building, or for retail space to be rented by the association. In that case, should he choose to make the entire 2 floors common elements, the provisions of paragraph (c)(1) would apply.

The declarant may state in his declaration any conditions or limitations on the time limits reserved for the exercise of development rights which would cause that development right to lapse before the time established in the declaration. It would, of course, be possible for a declarant to voluntarily relinquish those rights prior to the time that they automatically lapsed, and an instrument recorded by the declarant would be effective to cause that lapse, subject, of course, to any constraints imposed on voluntary relinquishment by the declarant's lender.

and is complete according to applicable codes and id a workman like manner.

§ 2-111. Alterations of Units

Subject to the provisions of the declaration and other provisions of law, a unit owner:

(1) may make any improvements or alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the common interest community;

(2) may not change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the common interest community, without permission of the association;

(3) after acquiring an adjoining unit or an adjoining part of an adjoining unit, may remove or alter any intervening partition or create apertures therein, even if the partition in whole or in part is a common element, if those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the common interest community. Removal of partitions or creation of apertures under this paragraph is not an alteration of boundaries.

COMMENT

1. This section deals with permissible alterations of the interior of a unit, and impermissible alterations of the exterior of a unit and the common elements, in ways which reflect common practice. The stated rules, of course, may be varied by the declaration where desired.

2. Subsection (3) deals in a unique manner with the problem of creating access between adjoining units owned by the same person. The subsection provides a specific rule which would permit a door, stairwell, or removal of a partition wall between those units, so long as structural integrity is not im-

paired. That alteration would not be an alteration of boundaries, but would be an exception to the basic rule stated in subsection (2).

3. In considering permissible alteration of the interior of a unit, an example may be useful. A nail driven by a unit owner to hang a picture might enter a portion of the wall designated as part of the common elements, but this section would not be violated because structural integrity would not be impaired. Moreover, no trespass would be committed because each unit owner, as a part or beneficial owner of the common elements, has a right to utilize them subject only to such restrictions as may be created by the Act, the declaration, bylaws, and the unit owners' association pursuant to Section 3-102.

4. Removal of a partition or the creation of an opening between adjoining units would permit the units to be used as one, but they would not become one unit. They would continue to be separate units within the meaning of Section 1-105 and would continue to be treated separately for the purposes of this Act.

5. In addition to the restrictions placed on unit owners by this section, the declaration or bylaws may restrict a unit owner from altering the interior appearance of his unit. Although this might be an undue restriction if imposed upon the primary residence of a unit owner, it may be appropriate in the case of time-share or other common interest communities.

§ 2-112. Relocation of Boundaries between Adjoining Units

(a) Subject to the provisions of the declaration and other provisions of law, the boundaries between adjoining units may be relocated by an amendment to the declaration upon application to the association by the owners of those units. If the owners of the adjoining units have specified a reallocation between their units of their allocated interests, the application must state the proposed reallocations. Unless the executive board determines, within 30 days, that the reallocations are unreasonable, the association shall prepare an amendment that identifies the units involved and states the reallocations. The amendment must be executed by those unit owners, contain words of conveyance between them, and, on recordation, be indexed in the name of the grantor and the grantee, and [in the grantee's index] in the name of the association.

(b) The association (i) in a condominium or planned community shall prepare and record plats or plans necessary to show the altered boundaries between adjoining units, and their dimensions and identifying numbers, and (ii) in a cooperative shall prepare and record amendments to the declaration, including any plans, necessary to show or describe the altered boundaries between adjoining units, and their dimensions and identifying numbers.

COMMENT

1. This section changes the effect of most current declarations, under which the boundaries between units may not be altered without unanimous or nearly unanimous consent of the unit owners. As the section makes clear, this result may be varied by restrictions in the declaration.

2. This section contemplates that upon relocation of the unit boundaries, no reallocation of allocated interests will occur if none is specified in the application. If a reallocation is specified but the executive board deems it

unreasonable, then the applicants have the choice of resubmitting the application with a reallocation more acceptable to the board, or going to court to challenge the board's findings as unreasonable.

3. The distinctions made by this section as to information required in the amendment, track the distinctions found in the corresponding UCA, HPCA and MRECA provisions, for condominiums, planned communities and cooperatives, respectively.

§ 2-113. Subdivision of Units

(a) If the declaration expressly so permits, a unit may be subdivided into 2 or more units. Subject to the provisions of the declaration and other provisions of law, upon application of a unit owner to subdivide a unit, the association shall prepare, execute, and record an amendment to the declaration, including in a condominium or planned community the plats and plans, subdividing that unit.

(b) The amendment to the declaration must be executed by the owner of the unit to be subdivided, assign an identifying number to each unit created, and reallocate the allocated interests formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit.

COMMENT

1. This section provides for subdivision of units by unit owners, thereby creating more and smaller units than were originally created. The underlying policy of this section is that the original development plan of the project must be followed, and the expectations of unit owners realized. Accordingly, unless subdivision of the units is expressly permitted by the original declaration, a unit may not be subdivided into 2 or more units unless the declaration is amended to permit it. A subdivision itself is accomplished by an amendment to the declaration.

2. At the same time, situations will often occur where future subdivision is

appropriate, and this section permits the declaration to provide for it.

3. An analogous concept in the context of development rights is subdivision of units by a declarant.

4. If a unit owned only by the declarant—as opposed to the same unit if owned by another person—may be subdivided into 2 or more units but cannot be converted in whole or in part into common elements, it is still a unit that may be subdivided or converted into 2 or more units or common elements, within the meaning of the definition of development rights. It is therefore governed by Section 2-110 and not by this section.

[ALTERNATIVE A]

§ 2-114. Easement for Encroachments

To the extent that any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists. The easement does not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to any plats and plans or, in a cooperative, to any representation in the public offering statement.]

[ALTERNATIVE B]

§ 2-114. Monuments as Boundaries

The existing physical boundaries of a unit or the physical boundaries of a unit reconstructed in substantial accordance with the description contained in the original declaration are its legal boundaries, rather than the boundaries derived from the description contained in the original declaration, regardless of vertical or lateral movement of the building or minor variance between those boundaries and the boundaries derived from the description contained in the original declaration. This section does not relieve a unit owner of liability in case of his willful misconduct or relieve a declarant or any other person of liability for failure to adhere to any plats and plans or, in a cooperative, to any representation in the public offering statement.]

COMMENT

Two approaches are presented here as alternatives, since uniformity on this issue is not essential, and various states have adopted one approach or the other. Both theories recognize the fact that the actual physical boundaries may differ somewhat from what is shown on the plats and plans, and the practical effect of both is the same.

The easement approach of Alternative A creates easements for whatever discrepancies may arise, while the "monuments as boundaries" approach of Alternative B would make the title lines move to follow movement of the physical boundaries caused by such discrepancies or subsequent settling or shifting.

§ 2-115. Use for Sales Purposes

A declarant may maintain sales offices, management offices, and models in units or on common elements in the common interest community only if the declaration so provides and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof. In a cooperative or condominium, any sales office, management office, or model not designated a unit by the declaration is a common element. If a declarant ceases to be a unit owner, he ceases to have any rights with regard thereto unless it is removed promptly from the common interest community in accordance with a right to remove reserved in the declaration. Subject to any limitations in the declaration, a declarant may maintain signs on the common elements advertising the common interest community. This section is subject to the provisions of other state law and to local ordinances.

COMMENT

1. This section prescribes the circumstances under which portions of the common interest community—either units or common elements—may be used for sales offices, management offices, or models. The basic requirement is that the declarant must describe his rights to maintain such offices in the declaration. There are no limitations on that right, so that either units owned by the declarant or other persons, or the common elements themselves, may be used for that purpose. Typical common element uses might include a sales booth in the lobby of a building, or a trailer or temporary building located outside the buildings on the grounds of the property.

2. In addition, this section contains a permissive provision permitting advertising on the common elements. The declarant may choose to limit his rights in terms of the size, location, or other matters affecting the advertising. The Act, however, imposes no limitations. At the same time, the last sentence of the section recognizes that state or local zoning or other laws may limit advertising, both in terms of size and content of the advertising, or the use of the units or common elements for such purposes. This section makes it clear that local law would apply in those cases.

§ 2-116. Easement Rights

(a) Subject to the provisions of the declaration, a declarant has an easement through the common elements as may be reasonably necessary for the purpose of discharging the declarant's obligations or exercising special declarant rights, whether arising under this [Act] or reserved in the declaration.

(b) In a planned community, subject to the provisions of Sections 3-102(a)(6) and 3-112, the unit owners have an easement (i) in the common elements for purposes of access to their units and (ii) to use the common elements and all real estate that must become common elements (Section 2-105(a)(6)) for all other purposes.

COMMENT

1. This section grants to declarant an easement across the common elements, subject to any self-imposed restrictions on that easement contained in the declaration. At the same time, the easement is not an easement for all purposes and under all circumstances, but only a grant of such rights as may be reasonably necessary for the purpose of exercising the declarant's rights. Thus, for example, if other access were equally available to the land where new units are being created, which did not require the declarant's construction equipment to pass and repass over the common elements in a manner which significantly inconvenienced the unit owners, a court might apply the "reasonably necessary"

test contained in this section to consider limitations on the declarant's easement. The rights granted by this section may be enlarged by a specific reservation in the declaration.

2. The declarant is also required to repair and restore any portion of the common interest community used for the easement granted under this section. See Section 1-119(b).

3. This section also grants unit owners in a planned community an easement for access, support, and enjoyment in the common elements because unit owners hold a beneficial, but no fee, interest in the common elements. These rights may be limited by the declaration.

§ 2-117. Amendment of Declaration

(a) Except in cases of amendments that may be executed by a declarant under Section 2-109(f) or 2-110, or by the association under Section 1-107, 2-106(d), 2-109(e), 2-112(a), or 2-113, or by certain unit owners under Section 2-108(b), 2-112(a), 2-113(b), or 2-118(d), and except as limited by subsection (d), the declaration, including any plats and plans, may be amended only by vote or agreement of unit owners of units to which at least [67] percent of the votes in the association are allocated, or any larger majority the declaration specifies. The declaration may specify a smaller number only if all of the units are restricted exclusively to non-residential use.

(b) No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

(c) Every amendment to the declaration must be recorded in every [county] in which any portion of the common interest community is located and is effective only upon recordation. An amendment, except an amendment pursuant to Section 2-112(a), must be indexed [in the grantee's index] in the name of the common interest community and the association and [in the grantor's index] in the name of the parties executing the amendment.

(d) Except to the extent expressly permitted or required by other provisions of this [Act], no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

(e) Amendments to the declaration required by this [Act] to be recorded by the association must be prepared, executed, recorded, and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association.

COMMENT

1. This section recognizes that the declaration, as the perpetual governing instrument for the common interest community, may be amended by various parties at various times in the life of the project. The basic rule, stated in subsection (a), is that the declaration, including the plats and plans, may only be amended by vote of 67% of the unit owners. The section permits a larger percentage to be required by the declaration, and also recognizes that, in an entirely non-residential common interest community, a smaller percentage might be appropriate.

In addition to that basic rule, subsection (a) lists the other instances where the declaration may be amended

by the declarant alone without association approval, or by the association acting through its board.

2. Section 1-101 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent subsection (d)'s requirement of unanimous consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real property is to be affected.

3. Subsection (c) describes the mechanics by which amendments recorded by the association are filed, and resolves a number of matters often neglected by bylaws.

§ 2-118. Termination of Common Interest Community

(a) Except in the case of a taking of all the units by eminent domain (Section 1-107) or in the case of foreclosure against an entire cooperative of a security interest that has priority over the declaration, a common interest community may be terminated only by agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses.

(b) An agreement to terminate must be evidenced by the execution of a termination agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The termination agreement must specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications thereof must be recorded in every [county] in which a portion of the common interest community is situated and is effective only upon recordation.

(c) In the case of a condominium or planned community containing only units having horizontal boundaries described in the declaration, a termination agreement may provide that all of the common elements and units of the common interest community must be sold following termination. If, pursuant to the agreement, any real estate in the common interest community is to be sold following termination, the termination agreement must set forth the minimum terms of the sale.

(d) In the case of a condominium or planned community containing any units not having horizontal boundaries described in the declaration, a termination agreement may provide for sale of the common elements, but it may not require that the units be sold following termination, unless the declaration as originally recorded provided otherwise or all the unit owners consent to the sale.

(e) The association, on behalf of the unit owners, may contract for the sale of real estate in a common interest community, but the contract is not binding on the unit owners until approved pursuant to subsections (a) and (b). If any real estate is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and

appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to unit owners and lien holders as their interests may appear, in accordance with subsections (h), (i), and (j). Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit. During the period of that occupancy, each unit owner and the unit owner's successors in interest remain liable for all assessments and other obligations imposed on unit owners by this [Act] or the declaration.

(f) In a condominium or planned community, if the real estate constituting the common interest community is not to be sold following termination, title to the common elements and, in a common interest community containing only units having horizontal boundaries described in the declaration, title to all the real estate in the common interest community, vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in subsection (j), and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit.

(g) Following termination of the common interest community, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear.

(h) Following termination of a condominium or planned community, creditors of the association holding liens on the units, which were [recorded] [docketed] [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment] before termination, may enforce those liens in the same manner as any lien holder. All other creditors of the association are to be treated as if they had perfected liens on the units immediately before termination.

(i) In a cooperative, the declaration may provide that all creditors of the association have priority over any interests of unit owners and creditors of unit owners. In that event, following termination, creditors of the association holding liens on the cooperative which were [recorded] [docketed] [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment] before termination may enforce their liens in the same manner as any lien holder, and any other creditor of the association is to be treated as if he had perfected a lien against the cooperative immediately before termination. Unless the declaration provides that all creditors of the association have that priority:

(1) the lien of each creditor of the association which was perfected against the association before termination becomes, upon termination, a lien against each unit owner's interest in the unit as of the date the lien was perfected;

(2) any other creditor of the association is to be treated upon termination as if the creditor had perfected a lien against each unit owner's interest immediately before termination;

(3) the amount of the lien of an association's creditor described in paragraphs (1) and (2) against each of the unit owners' interest must be proportionate to the ratio which each unit's common expense liability bears to the common expense liability of all of the units;

(4) the lien of each creditor of each unit owner which was perfected before termination continues as a lien against that unit owner's unit as of the date the lien was perfected; and

(5) the assets of the association must be distributed to all unit owners and all lien holders as their interests may appear in the order described

above. Creditors of the association are not entitled to payment from any unit owner in excess of the amount of the creditor's lien against that unit owner's interest.

(j) The respective interests of unit owners referred to in subsections (e), (f), (g), (h), and (i) are as follows:

(1) Except as provided in paragraph (2), the respective interests of unit owners are the fair market values of their units, allocated interests, and any limited common elements immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers must be distributed to the unit owners and becomes final unless disapproved within 30 days after distribution by unit owners of units to which 25 percent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and its allocated interests by the total fair market values of all the units and their allocated interests.

(2) If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof before destruction cannot be made, the interests of all unit owners are: (i) in a condominium, their respective common element interests immediately before the termination, (ii) in a cooperative, their respective ownership interests immediately before the termination, and (iii) in a planned community, their respective common expense liabilities immediately before the termination.

(k) In a condominium or planned community, except as provided in subsection (h), foreclosure or enforcement of a lien or encumbrance against the entire common interest community does not terminate, of itself, the common interest community, and foreclosure or enforcement of a lien or encumbrance against a portion of the common interest community, other than withdrawable real estate, does not withdraw that portion from the common interest community. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not withdraw, of itself, that real estate from the common interest community, but the person taking title thereto may require from the association, upon request, an amendment excluding the real estate from the common interest community.

(l) In a condominium or planned community, if a lien or encumbrance against a portion of the real estate comprising the common interest community has priority over the declaration and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance, upon foreclosure, may record an instrument excluding the real estate subject to that lien or encumbrance from the common interest community.

COMMENT

1. This section integrates the corresponding UCA, UPCA, and MRECA provisions governing termination of condominiums, planned communities and cooperatives, respectively. This section continues the distinctions made by UCA, UPCA, and MRECA for each type of common interest community. Each such distinction is discussed in the Comments to this section, below.

2. Historically, there were instances, particularly during the 1930's where cooperatives were terminated, often as a result of foreclosure following the association's failure to pay debt service. Those terminations created enormously complex problems for the coop-

eratives concerned. While few planned communities or condominiums have yet been terminated under present law, a number of problems are certain to arise upon termination which have not been adequately addressed by most of those statutes.

For all common interest communities, this Act seeks to deal comprehensively with the problems created by both voluntary and involuntary termination. These include such matters as the percentage of unit owners which should be required for termination; the time frame within which written consents from all unit owners must be secured; the manner in which common

elements and units should be disposed of following termination, both in the case of sale and non-sale of all of the real estate; the circumstance under which sale of units may be imposed on dissenting owners; the powers held by the board of directors on behalf of the association to negotiate a sales agreement; the practical consequences to the project from the time the unit owners approve the termination until the transfer of title and occupancy actually occurs; the impact of termination on liens on the units and common elements; distribution of sales proceeds; the effect of foreclosure or enforcement of liens against the entire common interest community with respect to the validity of the project; and other matters.

3. Recognizing that unanimous consent from all unit owners would be impossible to secure as a practical matter in a project of any size, and recognizing as well that a vote of the stockholders of a corporation under state corporate law may not adequately protect the interests of the minority, subsection (a) states a general rule that 80% of the votes in the association are required for termination of a project. The declaration may require a larger percentage of the votes and in a non-residential project, it may also permit a smaller percentage. Pursuant to Section 2-119 (Rights of Secured Lenders), lenders may require that the declaration specify a larger percentage of unit owner consent or, more typically, require the consent of a percentage of the lenders before the project may be terminated.

4. As a result of subsection (a) unless the declaration requires unanimous consent for termination, the declarant may be able to terminate the common interest community despite the unanimous opposition of other unit owners if the declarant owns units to which the requisite number of votes are allocated. Such a result might occur, for example, should a declarant be unable to continue sales in a project where some sales have been made. However, in such a case, other unit owners may have rights against the declarant under other law of the state, including the law of equity and contract.

5. Subsection (b) describes the procedure for execution of the termination agreement. It recognizes that not all unit owners will be able to execute the same instrument, and permits execution or ratification of the master termination agreement. Since the transfer of an interest in real estate is

being accomplished by the agreement, each of the ratifications must be executed in the same manner as a deed. Importantly, the agreement must specify the time within which it will be effective; otherwise, the project might be indefinitely in "limbo" if ratifications had been signed by some, but not all, required unit owners, and the signing unit owners fail to revoke their agreements. The agreement becomes effective only when it is recorded.

6. Subsections (c) and (d) deal with the question of when all the real estate in a planned community or condominium, or the common elements, may be sold without unanimous consent of the unit owners. The sections reach a different result based on the physical configuration of the project.

Subsection (c) states that if a planned community or condominium contains only units having horizontal boundaries—a typical high rise building—the unit owners may be required to sell their units upon termination despite objection. Under subsection (d), however, if the project contains any units which do not have horizontal boundaries then the termination agreement may not force dissenting unit owners to sell their units unless the declaration as originally recorded provides otherwise. The reason for the rule stated in subsection (d) is that owners of units not having horizontal boundaries—single family homes, for example—may wish to terminate the common interest community regime and sell the real estate which they supported with their common charges, but continue to own the homes which they occupy.

Obviously, if all the unit owners consent to the sale of the units, sale of the entire development would be possible.

7. Subsection (e) describes the powers of the association during the pendency of the termination proceedings. It empowers the association to negotiate for the sale, but makes the validity of any contract dependent on the unit owner approval. This subsection also makes clear that, upon termination, title to the real estate shall be held by the association, so that the association may convey title without the necessity of each unit owner signing the deed. Finally, this subsection makes clear that, until the association delivers title to the property, the project will continue to operate as it had prior to the termination, thus insuring that the practical necessities of operation of the real estate regime will not be impaired.

8. Subsection (f) contemplates the possibility that a planned community or condominium might be terminated but the real estate not sold.

Subsections (b) and (g), the parallel provisions to Section 2-117(b) and (d) of MRECA, contemplate the same possibility in the case of cooperatives. Termination without sale is not likely to be the usual case, but might occur if the unit owners plan conversion to another form of common interest community, for example, conversion from a cooperative to a condominium. In the case of a cooperative, title to the real estate upon termination would remain in the name of the association as trustee for the unit owners; see subsection (g). In a condominium or planned community, title to the common elements following termination vests in the unit owners as tenants in common if that real estate is not to be sold, see subsection (f), but until a sale occurs vests in the association if the real estate is to be sold; see subsection (e). In the case of a condominium or planned community which contains only units with horizontal boundaries, these title rules also apply to all the units. (See subsection (f)). In the remaining case, i.e., the case where there are some units with horizontal boundaries and some without horizontal boundaries, the Act provides, in subsection (f), that unit owners become tenants in common of the common elements, but continue to hold individual titles to their units. Therefore, in a condominium or planned community with units located in both a high rise building and in single story structures, the unit owners in the high rise building will hold individual title to their unit upon termination, and either the declaration or the termination agreement should address the needs for encumbrances of support and access for the high rise units over the real estate which all the unit owners will own as tenants in common. Undoubtedly, the unit owners will immediately reconstitute themselves as some form of common interest community.

Since, after termination of a cooperative title to the real estate remains in the association, it could record a new declaration corresponding to the new form of common interest community adopted, convey the units to the former unit holders, and then itself continue as the new common interest community's association.

9. Subsections (g), (h) and (i) deal with the very complex calculations and priorities which might result upon ter-

mination of a common interest community. These questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted and unsecured creditors of the association.

These subsections accord different treatment to these issues, depending upon the type of common interest community involved. The separate approaches continue the distinctive treatment which condominiums, planned communities and cooperatives have received under UCA, UPCA and MRECA, respectively. Each approach will be discussed and demonstrated in the comments below.

Termination of Condominiums and Planned Communities

10. Subsection (h) establishes general rules with respect to competing claims, but leaves to state law the resolution of the priorities of those competing claims.

The examples which follow illustrate the relative effects of several provisions set out in the Act, based on application of an assumed state lien priority rule of "first in time, first in right." In those instances, particularly involving mechanics' liens, where state law often establishes priorities at variance with that rule, that result is also indicated.

EXAMPLE 1:

HYPOTHETICAL FOR EXAMPLES 1A-III: A planned community consists of 5 detached single family homes on 5 individually owned lots, together with a 6th lot which is undeveloped but intended for future construction of a swimming pool serving all units. The development is served by a private road. Lot 6 and the private road are common elements owned by the association.

The declaration provides that the Act applies to this development (which would otherwise be exempt as a "small" planned community under Section 1-203). The documents also provide that: (1) upon termination, all units and the common elements must be sold; (2) the association is permitted to encumber Lot 6, and to grant a security interest in that lot for any purpose; and (3) votes and common expense liabilities are allocated equally among the units. For purposes of the example, we have assumed that the documents do not require the consent

of first mortgage holders before the unit owners may vote to terminate.

The 5 units were originally sold at equal prices of \$50,000. Common expenses in the project are \$100 per unit, per month, and are used for a variety of purposes, including insurance and upkeep of the units and common elements. At the time the units were conveyed, each of them was released from all liens affecting the planned community which were senior to the declaration, and the common elements were deeded to the association free of all liens.

A shopping center developer has offered \$380,000 for the purchase of the entire planned community. The association's members unanimously vote in favor of termination, and otherwise comply with Section 2-118. The ap-

praisal required by Section 2-118(j) shows that the units are still of equal value.

EXAMPLE 1A:

At the time of termination, the 5 units were financed as follows:

Unit 1: The owner's first mortgage had an unpaid balance of \$50,000.

Unit 2: The owner's first mortgage had an unpaid balance of \$10,000.

Unit 3: The owner's first mortgage had an unpaid balance of \$25,000.

Units 4 and 5: The owners paid cash, and there is no mortgage on either unit.

In addition, all common expenses had been paid when due. The other assets of the association, including reserves, bank account, and all other personal property, total \$20,000.

Under the Act (Section 2-118(g)), the association, following sale, holds the proceeds of sale together with the assets of the association, "as trustee for unit owners and holders of liens on the units as their interests may appear." In these circumstances, the interests of each party in the total value of \$400,000 would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Owners	30,000	40,000	55,000	80,000	80,000

EXAMPLE 1B:

The facts stated in Example 1A remain true. However, at termination, Unit 1 has failed to pay its common expenses for 12 months. In these circumstances, the interests of each party would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due Owners	28,000	40,000	55,000	80,000	80,000

In this example, both the lenders and the association are fully paid because the sales proceeds exceed the liens on the units. Note, however, that 6 months of the unpaid assessments prime the first mortgage pursuant to Section 3-116(b). Thus, if the sales proceeds had been only \$50,000 per unit, rather than \$80,000, the results with respect to Unit 1 would have been as follows:

Sales Proceeds	\$50,000
6-Month Assessment Due Association	600
Balance Paid to 1st Mortgage Holder	\$49,400
Loss to 1st Mortgage Lender	(1000)
Loss to Association	(600)

Of course, the association has, and the lender may have, a claim against the unit owner, personally, for the unpaid sums due them. Importantly, however, neither the other unit owners nor their units are subject to any liability for those claims.

Because the lien of the first mortgage holder, at termination or foreclosure, is junior to the first 6 months of unpaid assessments due the association, lenders may protect themselves under the Act by requiring the escrow of 6 months' common expense assessments, as they often do for real property taxes.

EXAMPLE 1C:

The facts stated in Example 1B remain true. However, after all the units were initially sold, but before termination, 80% of the unit owners agree to build a swimming pool on Lot 6. The association contracts with XYZ Pool Company to build the pool for \$100,000. XYZ does not take a security interest in the common elements, as it might have done under

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Due Owners	8,800	20,000	35,000	60,000	60,000

EXAMPLE 1D:

All facts stated in Example 1C remain true, except that XYZ Pool Company, at the time it contracts to build the pool, takes a security interest in Lot 6, pursuant to Section 3-112, and that security interest includes a release of that real estate, upon default, from all restrictions imposed on the real estate by the declaration. At termination, XYZ has not instituted any action against the association to enforce its claim.

In these circumstances, XYZ, as a secured creditor with respect to Lot 6, holds an interest superior to the declaration, and would have the right to exclude that real estate from the project. Any sale of the entire planned community would be subject to the superior interest of XYZ. For that reason, in the normal circumstances, the association would not be able to secure a release of that lien unless XYZ were

Section 3-112; and does not act to perfect any available mechanics' lien under state law. The pool is properly completed. When the association fails to pay, XYZ sues the association, secures a judgment, and properly perfects its judgment pursuant to Section 3-111 (Tort and Contract Liability). As provided in Section 3-111, liens resulting from judgments against the association are governed by Section 3-117. At the time of termination, XYZ has not been paid, and its claim amounts to \$100,000.

Section 3-117(a) provides that a "judgment for money against the association," if perfected as a lien on real property under state law, "is a lien in favor of the judgment lienholder against all of the units." However, the last sentence also provides that the judgment is not a lien on the common elements. Accordingly, XYZ holds a \$20,000 lien on each of the units as of the date the lien is perfected. In these circumstances, the interests of the parties are as follows:

paid in full from the proceeds of the sale, which would have the effect of reducing the value of the sale to \$280,000. Note that this has the economic effect of placing the XYZ claim, at termination, ahead of prior first mortgages. For this reason, first mortgage holders will typically require their consent before common elements may be subjected to a lien.

EXAMPLE 1E:

The facts stated in Example 1C remain true so that XYZ holds only a perfected judgment lien, not a security interest in the common elements.

After the XYZ lien was perfected, a \$50,000 uninsured judgment is entered against the owner of Unit 4, resulting from his personal business. The lien is perfected, and rests only against Unit 4. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Due Owners	8,800	20,000	35,000	10,000	60,000

EXAMPLE 1F:

The facts stated in Example 1E remain true. After the swimming pool is built, a neighbor's child falls into the untended and unfenced pool, and is injured. The child sues the association. One month after the personal judgment against Unit 4 is perfected, the child secures a judgment against the

association for \$100,000 more than the association's insurance. Under state law, the tort judgment, when perfected, constitutes a lien only from the date judgment is entered, and does not enjoy a higher priority. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Tort Lien	8,800	20,000	20,000	10,000	20,000
Due Owners	-0-	-0-	15,000	-0-	40,000

Note that the child's lien realizes only \$78,800; the estate is not entitled to participate in the proceeds available to Units 3 and 5 to satisfy the unmet claims against Units 1 and 4, because those units are liable only for their pro rata share of the claim, which in the same amount any of those units would have had to pay prior to termination in order to secure a partial release. Thus, if Unit 5, prior to termination, had secured a partial release for \$20,000 from the estate, the result would be the same.

Note also that the value of the common elements is not segregated from the values of the units, since the sales' values of the units reflect all of the value of the real estate. Similarly, note that, after termination, the tort claimant is not entitled to reach or segregate the personal property of the corporation, valued before termination at \$20,000, even though he could have

reached the bank account or other assets prior to termination. Any other rule would create enormous complexity, would impose arbitrary losses on creditors out of priority, and would tend to shift economic losses to unit owners who had paid their share of claims.

EXAMPLE 1G:

The facts stated in Example 1F remain true. After the Unit 4 personal lien is perfected, but, one week before the tort judgment against the association is perfected, P Paving Company begins repaving the private road. Work is completed one week after the tort judgment is perfected. The association fails to pay P \$50,000 upon completion as agreed, and P immediately records its mechanics' lien. Under state law, a mechanics' lien, if recorded within 60 days of the time work is completed, holds priority as of the day work began. State law does not,

however, grant the mechanics' lien priority over any liens perfected before work began. P Paving sues on its

lien, and secures a judgment. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	000	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	000	-0-	-0-	-0-	-0-
XYZ Pool Lien Personal	20,000	20,000	20,000	20,000	20,000
Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	10,000
Tort Lien	-0-	10,000	20,000	-0-	20,000
Due Owners	-0-	-0-	5,000	-0-	30,000

Note that, just as in the case of the tort lien, when Unit 1 could not contribute its share of the mechanics' lien, the remaining units are not liable for the balance.

In the example, the common expense lien arises before the P Paving lien had arisen. If the common expense lien arose after the P Paving lien, we would be faced with circular liens, where: (a) the P Paving lien would prime the common expense lien; (b) 0 months of the common expense lien would prime the mortgage; and (c) the mortgage would prime the P Paving lien. Such circular lien problems, however, are not unique in the law.

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Common Expense Lien First	000	-0-	-0-	-0-	-0-
Mortgage Liens Common	50,000	40,000	25,000	-0-	-0-
Expense Lien Personal	000	-0-	-0-	-0-	-0-
XYZ Pool Lien	20,000	20,000	20,000	20,000	-0-
Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	-0-
Tort Lien	-0-	10,000	20,000	-0-	-0-
Due Owners	-0-	-0-	5,000	-0-	80,000

All the results stated above would be the same as to a condominium.

EXAMPLE 2:

The facts stated in example 1G remain true. Assume, however, that, at the outset, Unit 5 was twice as large

EXAMPLE III:

The facts stated in example 1G remain true. Assume Unit 5, before termination, paid its pro rata share of both the P Paving lien and the tort lien. This reduces the P Paving lien to \$10,000, and the tort lien to \$80,000. Under Section 3-117, this entitles Unit 5 to a partial release of both claims, and neither P Paving nor the child has a further claim against Unit 5. The interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Common Expense Lien First	000	-0-	-0-	-0-	-0-
Mortgage Liens Common	50,000	40,000	25,000	-0-	-0-
Expense Lien Personal	000	-0-	-0-	-0-	-0-
XYZ Pool Lien	20,000	20,000	20,000	20,000	-0-
Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	-0-
Tort Lien	-0-	10,000	20,000	-0-	-0-
Due Owners	-0-	-0-	5,000	-0-	80,000

as the others, sold for \$100,000, or twice as much as the others, and twice the common expense liability was allocated to it. At termination, it remains twice as valuable. In those circumstances, the results on sale are as follows:

UNIT #	1	2	3	4	5
Sale Proceeds Common	60,000	60,000	60,000	60,000	133,332
Expense Lien First	000	-0-	-0-	-0-	-0-
Mortgage Lien Common	50,000	40,000	25,000	-0-	-0-
Expense Lien Personal	000	-0-	-0-	-0-	-0-
XYZ Pool Lien	15,400	10,000	10,000	10,000	33,333
Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	13,333	-0-	20,000
Tort Lien	-0-	1,007	10,000	-0-	33,333
Due Owners	-0-	-0-	-0-	-0-	50,000

Note that all the liens are allocated in accordance with each unit's common expense liability, since no special provision was made for allocating the costs of the pool, the paying or the tort claim. Unit 5 probably did not contemplate the size of its exposure; nevertheless, fewer dollars were available to creditors upon termination than in Example 1G.

EXAMPLE 3:

The facts stated in Example 1G remain true, including the fact that Unit

5 was originally sold at the same price (\$50,000) as the remaining units. Upon appraisal, however, assume that, because of improvements, Unit 5 is now worth \$75,000. Three other units have remained at \$50,000, while Unit 1 was neglected, and is now worth only \$40,000. Common expense liabilities never changed. In this example, the total value of the units is now \$265,000. Since sales proceeds are distributed in accordance with fair market values, the following distribution of proceeds would apply:

Unit 1:	(15.09433%)	\$ 60,377
Unit 2:	(18.86793%)	\$ 75,472
Unit 3:	(18.86793%)	\$ 75,472
Unit 4:	(18.86793%)	\$ 75,472
Unit 5:	(28.30188%)	\$113,207
	100.00000%	\$400,000

UNIT #	1	2	3	4	5
Sales Proceeds Common	60,377	75,472	75,472	75,472	113,207
Expense Lien First	000	-0-	-0-	-0-	-0-
Mortgage Lien Common	50,000	40,000	25,000	-0-	-0-
Expense Lien Personal	000	-0-	-0-	-0-	-0-
XYZ Pool Lien	9,177	20,000	20,000	20,000	20,000
Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	10,000	5,472	10,000
Tort Lien	-0-	5,472	20,000	-0-	20,000
Due Owners	-0-	-0-	472	-0-	63,207

In this example, the equal distribution of common expense liability coupled with the "fair value" distribution of sales proceeds create the greatest losses for the creditors of the association.

11. Subsection (j)(2) is an exception to the "fair market value" rule. It provides that, if appraisal of any condominium unit cannot be made, either through pictures or comparison with other units, so that any unit's appropriate share in the overall proceeds cannot be calculated, then the distribution will fall back on the only objective, albeit artificial, standard available,

which is the common element interest allocated to each unit.

12. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium or planned community, but, if a mortgagee or other lienholder for any other party requires units with a sufficient number of votes, that party can cause the condominium or planned

community to be terminated pursuant to subsection (n) of this section.

13. A mortgage or deed of trust on a unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower's undivided interest in the whole property. However, such a shift would be deemed to occur even in the absence of express language, pursuant to subsection (i).

Termination of Cooperatives

14. Subsection (i) deals with the very complex calculations and priorities which might result upon termination of a cooperative, in light of the possibility that the association itself might have its own secured creditors, while unit owners and their creditors would seek to enforce their own claims against the proceeds of sale. The Act recognizes, in considering this issue, that there are two competing interests to be resolved. On the one hand, cooperative developers and lenders have traditionally financed cooperatives through loans to the cooperative association secured by one or more blanket mortgages on the cooperative's real estate. Any uniform proposal to reduce the priorities of some or all such mortgages in favor of creditors secured only by interests in some of the units would have a negative effect on that traditional form of financing.

At the same time, it has become increasingly evident that the frequent inability of unit owners to readily recall their units may be traced in part to the reluctance of spot lenders to place mortgages on individual units which may always be subordinate to the claims of the association's secured creditors, even when those associations creditors obtain their security interest at a date later than the date of the spot loan. As a result, the Conference was urged to draft the Act in a manner which would enhance the financing of individual units.

This section became the focal point for much of that debate. In resolving it, the Act takes a middle approach, by providing the declarant an election among priority systems.

Subsection (i) permits the declarant to include in the declaration a provision that all the association's creditors, upon termination, will have priority over all the interests of unit owners and their creditors. If the declaration does so provide, the association's creditors would enforce their liens in their normal priority, while unsecured creditors of the association would be treat-

ed as if they had perfected their liens immediately prior to termination. Only when all of the association's creditors had been satisfied would the unit owners and their creditors be entitled to participate in the proceeds of sale. Such a result, while significantly different from the result flowing under UCA or UPCA, is a recognition of the fundamental differences between the financing of condominiums and cooperatives. Such a provision would likely maximize the ability of the cooperative to secure initial and subsequent blanket financing, while tending to discourage spot loans for units. Alternatively, Subsection (i) contemplates that the declarant may wish to enhance the financeability of units while insuring that the initial blanket financing of a cooperative will not be jeopardized. Accordingly, it provides that, in the absence of a provision in the declaration which grants senior priority to the association's creditors, the liens of all creditors with an interest in the cooperative's property would be fractionalized upon termination, and would constitute a lien against each unit proportionate to that unit's common expense liability. No lien would lie against the cooperative's real estate as a whole, but a senior blanket mortgage, for example, would constitute a first lien against every unit in proportion to the common expense liabilities of the various units.

15. In the case of fractionalized liens, a particularly complex series of creditors' rights questions arise upon termination. Those questions involve competing claims of holders of first security interests on individual units, the secured and unsecured creditors of individual unit owners, as well as blanket mortgagees and judgment creditors of the association. The second part of subsection (i) attempts to establish general rules with respect to these competing claims, but leaves to state law the resolution of the priorities of those claims. In considering this problem, in the analogous context of condominiums and planned communities, which mandate fractionalized liens upon termination, comment 10 above includes examples of how these competing claims might be resolved. If all creditors of the association have priority over all creditors of unit owners, of course, the examples set out in comment 10 have to be adjusted appropriately.

Other Provisions

16. Subsection (j) describes the method by which the interests of pro-

prietary lessors are to be calculated, and adopts an appraisal procedure for allocation of the sales proceeds in all three forms of ownership.

It departs significantly from the usual result under most condominium acts. Under those acts the proceeds of the sale of the entire project are distributed upon termination to each unit owner in accordance with the common element interest which was allocated at the outset of the project. Of course, in an older development, those original allocations will bear little resemblance to the actual value of the units. For that reason, the Act adopts an appraisal procedure for distribution of proceeds. As suggested in the examples on the distribution of proceeds, this appraisal may dramatically affect the amount of dollar actually received by unit owners. Accordingly, it is likely the appraisal will be required to be distributed prior to the time the termination is approved, so that unit owners may understand the likely financial consequences of the termination. If an initial appraisal made pursuant to subsection (j) were rejected by vote of the unit owners, the association would be obligated to secure a new appraisal.

17. With respect to the association's role as trustee under subsection (g), see Section 3-119.

18. "Foreclosure" in subsection (k) includes deeds in lieu of foreclosure.

and "liens" includes tax and other liens on real estate which may be converted or withdrawn from the project.

19. The termination agreement should adopt or contain any restrictions, covenants and other provisions for the governance and operation of the property formerly constituting the common interest community which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a common interest community which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the state governing tenancies in common would apply.

20. Subsection (l) recognizes the possibility that a pre-existing lien might not have been released prior to the time the condominium or planned community declaration was recorded. Recordation of the declaration should not constitute a changing of the priority of those liens; and it is contrary to all expectations that a prior lienholder may be involuntarily subjected to the condominium or planned community documents. For that reason, this section permits the non-consenting prior lienholder upon foreclosure to exclude the real estate subject to his lien from the condominium or planned community.

§ 2-119. Rights of Secured Lenders

The declaration may require that all or a specified number or percentage of the lenders who hold security interests encumbering the units approve specified actions of the unit owners or the association as a condition to the effectiveness of those actions, but no requirement for approval may operate to (i) deny or delegate control over the general administrative affairs of the association by the unit owners or the executive board, or (ii) prevent the association or the executive board from commencing, intervening in, or settling any litigation or proceeding, or (iii) prevent any insurance trustee or the association from receiving and distributing any insurance proceeds except pursuant to Section 3-113.

COMMENT

1. In a number of instances, particularly sale or encumbrances of common elements, or termination of a planned community, a lender's security may be dramatically affected by acts of the as-

sociation. For that reason this section permits the declaration to provide that lender ratification of specified actions of the association is a condition of their effectiveness.

2. There are three important limitations on the rights of lender consent. They are: (1) a prohibition on control over the general administrative affairs of the association; (2) restrictions on control over the association's powers during litigation or other proceedings; and (3) prohibition of receipt or distribution of insurance proceeds prior to application of those proceeds for rebuilding.

3. It is important that lenders not be able to step in and unilaterally act as receiver or trustee of the association. There may, of course, be occasions when a court of competent jurisdiction would order appointment of a receiver for an association. While this would be possible in a court proceeding, the Act prohibits private contractual granting of such a power.

4. Since it may well be that the association might find itself involved in litigation which would be adverse to

the interests of the lender or the declarant, it is inappropriate for a secured party to be able to control the course of litigation in the absence of the consent of the other parties. In an appropriate case, of course, where the lenders' interests are affected, a lender might seek to intervene as a party.

5. Section 3-113 specifies the distribution of insurance proceeds. In particular, it prevents distribution of those proceeds to lenders until the intended purpose of the insurance has been met. For that reason, under this section the declaration may not provide the lender a right to receive insurance proceeds in any manner except the manner provided in Section 3-113.

6. In addition to the provisions of the declaration, the provisions of individual deeds to units may require that unit owner to secure his lender's consent before taking particular actions.

(2) All members of the executive boards of all common interest communities subject to the master association may elect all members of the master association's executive board.

(3) All unit owners of each common interest community subject to the master association may elect specified members of the master association's executive board.

(4) All members of the executive board of each common interest community subject to the master association may elect specified members of the master association's executive board.

COMMENT

1. This section adopts the approach uniformly adopted by UCA, UPCA and MRECA.

2. It is common in large or multi-phased condominiums or planned communities, particularly those developed under existing laws, for the declarant to create a master or umbrella association which provides management services or decision-making functions for a series of smaller projects. While it is expected that this phenomenon will be less necessary under this Act because of the permissible period of time for declarant control over the project, it is nonetheless possible in larger developments that this form of management will continue.

3. Subsection (a) states the general rule that the powers of a unit owners' association may only be exercised by, or delegated to, a master association if the declaration for the common interest community permits that result. The declaration may have originally provided for a master association; alternatively, the unit owners of several common interest communities may amend their declarations in similar fashion to provide for this power. Subsection (a) makes it clear that, if any of the powers of the unit owners' association may be exercised by, or delegated to, a master association, all other provisions of this Act which apply to a unit owners' association apply to that master association except as modified by this section. Accordingly, provisions on notice, voting, quorums, records, meetings, and other matters which apply to the unit owners' association would apply with equal validity to such a master association.

4. Subsection (b) limits the ability of a master association to exercise the powers of the unit owners' association, except in those cases where the master association is actually acting as the only association for one or more common interest communities. In those cases where it is not so acting, however, the only powers of the unit owners' association which the master asso-

ciation may exercise are the ones expressly permitted in the declaration or in the delegation of power. This is in significant contrast with the rule of Section 3-102 that all of the powers described in that section may be exercised unless limited by the declaration.

5. Subsection (c) clarifies the liability of the members of the executive board of a unit owners' association when the common interest community for which the unit owners' association acts has delegated some of its powers to a master association. In that instance, subsection (c) makes it clear that the members of the executive board of the unit owners' association have no liability for acts and omissions of the master association board; under subsection (a), that liability lies with the members of the master association.

6. Subsection (d) addresses the question of the rights and responsibilities of the unit owners in their dealings with the master board. A variety of sections enumerated in subsection (d) provide certain rights and powers to unit owners in their dealings with their association. In the affairs of the master association, however, it would be incongruous for the unit owners to maintain those same rights if those unit owners were not in fact electing the master board. Thus, for example, the question of election of directors, meetings, notice of meetings, quorums, and other matters enumerated in those sections would have little meaning if those sections were read literally when applied to a master board which was not elected by all members of the common interest community subject to the master board. For that reason, the rights of notice, voting, and other rights enumerated in the Act are available only to the persons who actually elect the board.

7. Subsection (e) recognizes that there may be reasons for a representative form of election of directors of the master association. Alternatively, there may be cases where at large election is reasonable. For that rea-

§ 2-120. Master Associations

(a) If the declaration provides that any of the powers described in Section 3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation ~~for unincorporated association~~ that exercises those or other powers on behalf of one or more common interest communities or for the benefit of the unit owners of one or more common interest communities, all provisions of this [Act] applicable to unit owners' associations apply to any such corporation ~~for unincorporated association~~, except as modified by this section.

(b) Unless it is acting in the capacity of an association described in Section 3-101, a master association may exercise the powers set forth in Section 3-102(a)(2) only to the extent expressly permitted in the declaration of common interest communities which are part of the master association or expressly described in the delegations of power from those common interest communities to the master association.

(c) If the declaration of any common interest community provides that the executive board may delegate certain powers to a master association, the members of the executive board have no liability for the acts or omissions of the master association with respect to those powers following delegation.

(d) The rights and responsibilities of unit owners with respect to the unit owners' association set forth in Sections 3-103, 3-108, 3-109, 3-110, and 3-112 apply in the conduct of the affairs of a master association only to persons who elect the board of a master association, whether or not those persons are otherwise unit owners within the meaning of this [Act].

(e) Even if a master association is also an association described in Section 3-101, the certificate of incorporation or other instrument creating the master association and the declaration of each common interest community the powers of which are assigned by the declaration or delegated to the master association, may provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways:

(1) All unit owners of all common interest communities subject to the master association may elect all members of the master association's executive board.

son, subsection (c) provides that, after the period of declarant control has terminated, there may be 4 ways of electing the master association board. Those four ways are: (1) at-large election of the master board among all the common interest communities subject to the master association, (2) at-large election of the master board only among the members of the executive boards of all common interest communities subject to the master association, (3) each common interest community might have designated positions on the

master board, and those spaces could be filled by an at-large election among all the members of each common interest community, or (4) the designated positions could be filled by an election only among the members of the executive board of the unit owners' association for each common interest community. It would only be in the case of an at-large election of the master board among all common interest communities that subsection (d) would have no relevance.

§ 2-121. Merger or Consolidation of Common Interest Communities

(a) Any 2 or more common interest communities of the same form of ownership, by agreement of the unit owners as provided in subsection (b), may be merged or consolidated into a single common interest community. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant common interest community is the legal successor, for all purposes, of all of the pre-existing common interest communities, and the operations and activities of all associations of the pre-existing common interest communities are merged or consolidated into a single association that holds all powers, rights, obligations, assets, and liabilities of all pre-existing associations.

(b) An agreement of 2 or more common interest communities to merge or consolidate pursuant to subsection (a) must be evidenced by an agreement prepared, executed, recorded, and certified by the president of the association of each of the pre-existing common interest communities following approval by owners of units to which are allocated the percentage of votes in each common interest community required to terminate that common interest community. The agreement must be recorded in every [county] in which a portion of the common interest community is located and is not effective until recorded.

(c) Every merger or consolidation agreement must provide for the reallocation of the allocated interests in the new association among the units of the resultant common interest community either (i) by stating the reallocations or the formulas upon which they are based or (ii) by stating the percentage of overall allocated interests of the new common interest community which are allocated to all of the units comprising each of the pre-existing common interest communities, and providing that the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing common interest community must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing common interest community.

COMMENT

1. There may be circumstances where common interest communities may wish to merge or consolidate their activities by the creation of a single common interest community; this section provides for that possibility.

Subsection (a) makes it clear that a merger or consolidation may occur by the same vote of the unit owners nec-

essary to terminate the common interest community. If 2 or more common interest communities are merged or consolidated, the resulting common interest community is for all purposes the legal successor of the pre-existing common interest community, with a single association for all purposes. In the event common interest communities

did not wish to completely merge or consolidate their affairs, it would also be possible for them to create a master association pursuant to Section 2-120.

2. Under subsection (b), the merger or consolidation agreement is treated for recording purposes as an amendment to the declaration, and the same requirements for approval are mandated as for termination.

3. Subsection (c) does not state a minimum requirement for the contents of a merger or consolidation agreement, and any additional clauses not inconsistent with subsection (c) may be included. The important point that subsection (c) makes is that the reallocation of the allocated interests must be carefully stated.

Subsection (c) states 2 alternative rules in this respect. First, the reallocations may be accomplished by stating specifically the allocation of allocated interests to each unit, or by stating the formulas by which those interests may be allocated to each unit in all of the pre-existing common interest communities. Alternatively, the merger or consolidation agreement may state the percentage of overall allocated interests allocated to "all of the units comprising each of the pre-existing common interest communities." The agreement might then also provide that the position of the percentage allocated to each unit from among the shares allocated to each common interest community will be equal to the percentage of allocated interests allocated to that unit by the declaration of the pre-existing common interest community. An example of how this alternative formulation would operate may be useful.

EXAMPLE:

Assume that 2 adjoining planned communities wish to merge their activities into one planned community. Assume that the first planned community consists of 10 one-bedroom units, with an annual budget of \$10,000. Assume further that each of the units, being identical, has an equal common expense liability of 10% and one vote per unit.

The second planned community consists of 40 units, with 20 2-bedroom units and 20 3-bedroom units. The budget of the second planned community consists of \$70,000 per year. Each of the 2-bedroom units has been allocated a 2% common expense liability, while each of the 3-bedroom units has been allocated a 3% common expense liability. Finally, each of the units in the second planned community also has an equal vote.

There is no provision in the Act which mandates a particular allocation among planned communities 1 and 2 as to either common expense liabilities or votes. Should the unit owners wish to retain as much similarity to their previous common expense liabilities, however, and should they wish to retain equal voting in a merged project, it would be possible for them, pursuant to subsection (c)(ii), to state "the percentage of overall common expense liabilities and votes in the new association" as follows: as to common expense liabilities, they might allocate 12.5% of the common expense liabilities in the merged project to planned community 1, and 87.5% thereof to planned community 2. If the agreement further provided that "the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing planned community must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing planned community" as required by subsection (c), each unit in planned community 1 would then have allocated to it 1.25% of the common expense liabilities in the new planned community. It happens that 1.25% of the common expenses of a merged planned community which has a budget of \$80,000 equals \$1,000.

Under the same rationale, if each of the 2-bedroom units in the second planned community, to which were formerly allocated 2% of the common expense liabilities, now has allocated 2% of the 87.5% allocated to the second planned community, each of those units would then have allocated to it 1.75% of the common expense liabilities of the new planned community. 1.75% of \$80,000 is \$1,400. Similarly, each of the 3-bedroom units would then have allocated to it 2.625% of the common expense liabilities in the merged planned community. That percentage of the common expense liabilities of \$80,000 would yield an annual cost of \$2,100, the same cost as previously obtained in planned community 2.

Further, the unit owners are free to allocate votes among the units in any way which they see fit. Of course, if they choose to allocate equal votes to all the units, which was the method previously used in both planned communities, this would have the effect of giving 20% of the votes to planned community 1, even though planned community 1 had only 12.5% of the common expense liabilities. It may be, however, that this tracks with the ex-

pectations of the unit owners in both planned communities. Alternatively, planned community 1 might be allocated 12.5% of the votes, which, when divided up among the 10 units, would give each one-bedroom unit a .125 vote. If 87.5% of the votes were allocated equally among the unit owners in the second planned community, then each

of the unit owners in planned community 2 would have .21875 votes.

If some other configuration was to be desired, then the allocations would of necessity be made pursuant to paragraphs (c) (i) rather than (c) (ii).

The same result would be reached in a merger of planned communities or cooperatives.

§ 2-122. Addition of Unspecified Real Estate

In a planned community, if the right is originally reserved in the declaration, the declarant in addition to any other development right, may amend the declaration at any time during as many years as are specified in the declaration for adding additional real estate to the planned community without describing the location of that real estate in the original declaration; but, the amount of real estate added to the planned community pursuant to this section may not exceed 10 percent of the real estate described in Section 2-105(a)(3) and the declarant may not in any event increase the number of units in the planned community beyond the number stated in the original declaration pursuant to Section 2-105(a)(5).

COMMENT

In assembling land for large "new town" planned communities, developers have from time to time been unable to secure small parcels of real estate within the outer boundaries of the development at the time the original covenants for the development were recorded. Subsequently, however, for a variety of reasons, those parcels may become available and would logically form a part of the overall development. As a matter of policy, there is no reason to prohibit the amendment of the declaration to permit the addition of that land to the development, so long as that addition does not substantially increase the potential common expenses of the unit owners, nor the density of the project as originally projected by the declarant in his public offering statement.

This section was designed to address this relatively unusual problem. It permits the declarant to add those ut-

ter-required parcels of real estate to the development. This power is available only if the declarant makes clear in his original declaration that this development right has been reserved. The section also requires the declarant to impose his own time limit on the period during which this development right may be exercised. To foreclose the possibility of an increase in the density of the project beyond that which was originally contemplated, the section also prohibits the declarant from increasing the number of units in the planned community beyond the number originally stated in the declaration. Finally, to impose a reasonable limitation on the amount of new land that may be added, the amount of real estate added to the planned community pursuant to this section may not exceed 10% of the real estate originally subjected to the declaration.

or rule injunctive relief for violation of its declaration, bylaws or rules

ARTICLE 3

MANAGEMENT OF THE COMMON INTEREST COMMUNITY

§ 3-101. Organization of Unit Owners' Association

A unit owners' association must be organized no later than the date the first unit in the common interest community is conveyed. The membership of the association at all times consists exclusively of all unit owners or, following termination of the common interest community, of all former unit owners entitled to distributions of proceeds under Section 2-118 or their heirs, successors, or assigns. The association must be organized as a profit or nonprofit corporation, trust, [or] partnership [, or as an unincorporated association].

COMMENT

1. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the common interest community even during a period of declarant control reserved pursuant to Section 3-103(d).

2. The bracketed language preserves the flexibility existing in practically all states today to organize the association of a condominium, cooperative or

planned community as a profit or nonprofit corporation, trust or partnership. Most associations are either corporations or unincorporated associations, but occasionally developers or their lawyers have found trust or partnership forms valuable. Although at least one state (Georgia) requires the organization of a condominium association in corporate form, it is not desirable to mandate this result in a uniform act. If a state wishes to mandate incorporation, it should delete the bracketed language.

§ 3-102. Powers of Unit Owners' Association

(a) Except as provided in subsection (b), and subject to the provisions of the declaration, the association [, even if unincorporated,] may:

- (1) adopt and amend bylaws and rules and regulations;
- (2) adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;
- (3) hire and discharge managing agents and other employees, agents, and independent contractors;
- (4) institute, defend, or intervene in litigation or administrative proceedings in its own name or behalf of itself or 2 or more unit owners on matters affecting the common interest community;
- (5) make contracts and incur liabilities;
- (6) regulate the use, maintenance, repair, replacement, and modification of common elements;
- (7) cause additional improvements to be made as a part of the common elements;
- (8) acquire, hold, encumber, and convey in its own name any right, title, or interest in real estate or personal property, but (i) common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to Section 3-112 and (ii) part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to Section 3-112;
- (9) grant easements, leases, licenses, and concessions through or over the common elements;

(10) impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in Sections 2-102(2) and (4), and for services provided to unit owners;

(11) impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules, and regulations of the association;

(12) impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by Section 4-109, or statements of unpaid assessments;

(13) provide for the indemnification of its officers and executive board and maintain directors' and officers' liability insurance;

(14) assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;

(15) exercise any other powers conferred by the declaration or bylaws;

(16) exercise all other powers that may be exercised in this State by legal entities of the same type as the association; and

(17) exercise any other powers necessary and proper for the governance and operation of the association.

(b) The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

COMMENT

1. This section permits the declaration, subject to the limitations of subsection (b), to include limitations on the exercise of any of the enumerated powers. The bracketed language making a specific reference to unincorporated associations is not intended to exclude other forms of association; the unincorporated association would have such powers, subject to the declaration, regardless of the legal status of an unincorporated association in the state. If a state wishes to permit the association to be unincorporated and the law of the state is unclear whether an unincorporated association would have such powers in the absence of the language, the bracketed language should be retained and the brackets removed.

2. Required provisions of the bylaws of the association, referenced in paragraph (1), are set forth in Section 3-100.

3. This Act makes clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest. In the absence of a statutory grant of standing such as that set forth in paragraph (4), some courts have held that a condominium association, because it has no ownership interest in the condominium, has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name.

4. Paragraph (8) refers to the power granted by Section 3-112, upon a vote of the requisite number of unit owners, to sell or encumber common elements in a condominium or planned community or to sell part or encumber all or part of a cooperative without a termination of the common interest community. Paragraph (9) permits the association to grant easements, leases, licenses, and concessions with respect to the common elements without a vote of the unit owners.

5. The powers granted the association in paragraph (11) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the common interest community. These powers are intended to be in addition to any rights which the association may have under other law.

6. Under paragraph (14), the declaration may provide for the assignment of income of the association, including common expense assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration—for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources

such as income from tenants, or to a specified percentage of common expense assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. The inability of associations to borrow because of a lack of assets, in spite of its income stream, has been a significant problem.

7. If the association is incorporated, it may, pursuant to paragraph (16),

exercise all other powers of a corporation. Similarly, if the association is unincorporated, the association may, by virtue of paragraph (16), exercise all other powers of an unincorporated association. Inconsistent provisions of state corporation or unincorporated association law are subject to the provisions of this Act, as provided in Section 1-109.

§ 3-103. Executive Board Members and Officers

(a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this Act, the executive board may not in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board are required to exercise ~~all powers conferred by the declaration~~, the care required of fiduciaries of the unit owners and ~~all powers conferred by the unit owners, ordinary and reasonable care~~.

(b) The executive board may not act on behalf of the association to amend the declaration (Section 2-117), to terminate the common interest community (Section 2-118), or to elect members of the executive board or determine the qualifications, powers and duties, or terms of office of executive board members (Section 3-102(f)), but the executive board may fill vacancies in its membership for the unexpired portion of any term.

(c) Within 30 days after adoption of any proposed budget for the common interest community, the executive board shall provide a summary of the budget to all the unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than 14 nor more than 30 days after mailing of the summary. Unless at that meeting a majority of all unit owners or any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the unit owners must be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board.

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by him, may appoint and remove the officers and members of the executive board. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of: (i) 60 days after conveyance of 75 percent of the units that may be created to unit owners other than a declarant; (ii) 2 years after all declarants have ceased to offer units for sale in the ordinary course of business; or (iii) 2 years after any right to add new units was last exercised. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period, but in that event the declarant may require, for the duration of the period of declarant control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

(e) Not later than 60 days after conveyance of 25 percent of the units that may be created to unit owners other than a declarant, at least one member and not less than 25 percent of the members of the executive board must be elected by unit owners other than the declarant. Not later than 60 days after conveyance of 50 percent of the units that may be created to unit

owners other than a declarant, not less than [33 1/3] percent of the members of the executive board must be elected by unit owners other than the declarant.

(f) Except as otherwise provided in Section 2-120(e), not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least 3 members, at least a majority of whom must be unit owners. The executive board shall elect the officers. The executive board members and officers shall take office upon election.

(g) Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board with or without cause, other than a member appointed by the declarant.

COMMENT

1. Subsection (a) makes members of the executive board appointed by the declarant liable as fiduciaries of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant.

Officers and board members elected by the unit owners are required only to exercise ordinary and reasonable care. This lower standard of care should increase the willingness of unit owners to serve as officers and members of the board.

2. The provisions of paragraph (c) permit the unit owners to disapprove any proposed budget, but a rejection of the budget does not result in cessation of assessments until a budget is approved. Rather, assessments continue on the basis of the last approved periodic budget until the new budget is in effect.

3. Subsections (d) and (e) recognize the practical necessity for the declarant to control the association during the developmental phases of a project. However, any executive board member appointed by the declarant pursuant to subsection (d) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity.

4. Subsection (d) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner.

5. Subsection (e), in combination with subsection (d), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters.

(b) Upon transfer of any special declarant right, the liability of a transferor or declarant is as follows:

(1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon him by this [Act]. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor.

(2) If a successor to any special declarant right is an affiliate of a declarant (Section 1-103(1)), the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the common interest community.

(3) If a transferor retains any special declarant rights, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this [Act] or by the declaration relating to the retained special declarant rights and arising after the transfer.

(4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.

(c) Unless otherwise provided in a mortgage instrument, deed of trust, or other agreement creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of any units owned by a declarant or real estate in a common interest community subject to development rights, a person acquiring title to all the property being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that property held by that declarant, or only to any rights reserved in the declaration pursuant to Section 2-115 and held by that declarant to maintain models, sales offices, and signs. The judgment or instrument conveying title must provide for transfer of only the special declarant rights requested.

(d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of all interests in a common interest community owned by a declarant:

(1) the declarant ceases to have any special declarant rights, and

(2) the period of declarant control (Section 3-103(d)) terminates unless the judgment or instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.

(e) The liabilities and obligations of a person who succeeds to special declarant rights are as follows:

(1) A successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on the transferor by this [Act] or by the declaration.

(2) A successor to any special declarant right, other than a successor described in paragraphs (3) or (4) or a successor who is an affiliate of a declarant, is subject to the obligations and liabilities imposed by this [Act] or the declaration:

(i) on a declarant which relate to the successor's exercise or non-exercise of special declarant rights; or

(ii) on his transferor, other than:

(A) misrepresentations by any previous declarant;

(B) warranty obligations on improvements made by any previous declarant, or made before the common interest community was created;

(C) breach of any fiduciary obligation by any previous declarant or his appointees to the executive board; or

*following
Marcher
notice
under AS
34.08.390*

§ 3-104. Transfer of Special Declarant Rights

(a) A special declarant right (Section 1-103(20)) created or reserved under this [Act] may be transferred only by an instrument evidencing the transfer recorded in every [county] in which any portion of the common interest community is located. The instrument is not effective unless executed by the transferee.

(D) any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs (Section 2-115), may not exercise any other special declarant right, and is not subject to any liability or obligation as a declarant, except the obligation to provide a public offering statement [1] and any liability arising as a result thereof [and obligations under Art. 10-5].

(4) A successor to all special declarant rights held by a transferor who succeeded to those rights pursuant to a deed or other instrument of conveyance in lieu of foreclosure or a judgment or instrument conveying title under subsection (c), may declare in a recorded instrument the intention to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit or real estate subject to development rights owned by the successor, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right held by his transferor to control the executive board in accordance with Section 3-103(d) for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, the successor declarant is not subject to any liability or obligation as a declarant other than liability for his acts and omissions under Section 3-103(d).

(f) Nothing in this section subjects any successor to a special declarant right to any claims against or other obligations of a transferor declarant, other than claims and obligations arising under this [Act] or the declaration.

COMMENT

1. This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant's interest in a common interest community. There are two parts to the problem. First, what obligations and liabilities to unit owners (both existing and future) should a declarant retain, notwithstanding his transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant's successor in interest.

2. This section strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to a declarant's rights, especially persons such as mortgagees whose only interest in the project is to protect their debt security. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he was in control of the community, while relieving a declarant who transfers all or part of his special declarant rights in a project of such responsibilities with respect to the promises, acts, or omissions of a successor

over whom he has no control. Similarly, the section absolves a non-affiliated transferee of responsibility for the promises, acts, or omissions of a transferor declarant over which he had no control. Finally, the section makes special provision for the interests of certain successor declarants (e.g., a mortgagee who succeeds to the rights of the declarant pursuant to a "deed in lieu of foreclosure" and who holds the project solely for transfer to another person) by relieving such persons of virtually all of the obligations and liabilities imposed upon declarants by this Act.

3. Subsection (a) provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recording requirement is important to determine the duration of the period of declarant control pursuant to Section 3-103(d) and (e), as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this Act. The transfer by a declarant of all of his interest in a project to a successor without a concomitant trans-

fer of the special rights of a declarant pursuant to this subsection, results in the automatic termination of such special declarant rights and of any period of declarant control.

A declarant may wish to transfer special declarant rights as a part of his transfer to another person of units already constructed in a cooperative. If the declaration has specified that units are personal property, the transfer of the units themselves will be personal property transfers not subject to the real estate recording act. However, under subsection (a), if special declarant rights are to be transferred, that transfer must be evidenced by an instrument recorded in every county in which the cooperative lies. The intent of that provision is that the recording be in the land records and identify the real estate involved so that a title examination relating to the land in the cooperative would reveal the transfer of the special declarant right.

In a common interest community, a mortgage recorded prior to the recording of the declaration would have priority over any rights of declarants or unit owners arising under the declaration. However, under Section 2-118(k) and (l), foreclosure of such a mortgage does not automatically terminate the effectiveness of a condominium or planned community declaration; the declaration becomes ineffective as to the land covered by the prior mortgage only if the purchaser at the foreclosure sale records an instrument excluding the real estate from the condominium or planned community. If the purchaser on the foreclosure of the prior mortgage elects to have the real estate remain in the condominium or planned community, it becomes a successor declarant subject to the general rules of this section, including those applicable to persons who acquire special declarant rights by virtue of foreclosure sales (subsection c).

However, under the Act, foreclosure of a mortgage which is prior to a cooperative declaration automatically removes the real estate from the cooperative since there is nothing in the Act which would change the ordinary rule that the foreclosure of a mortgage which is prior to any restrictive covenants or easements results in a transfer free of those "junior interests." (See Section 2-118(k) and (l)).

Therefore, in the absence of some contractual arrangement between the mortgagee and the association under which the buyer at the foreclosure sale has a right to reconvey the property

to the association, the purchaser at the foreclosure sale could not succeed to any development rights of the declarant since the property would be removed from the cooperative by the foreclosure sale itself. However, there is nothing in the act which would preclude the developer from having the association contractually obligate itself to retake title to foreclosed property on specified terms. If the underlying mortgage is of the entire cooperative property, there would probably be no advantage in such an arrangement since the foreclosing mortgagee with the entire project could set up his own cooperative association and undertake new marketing efforts without regard to the obligations and liabilities of the prior cooperative association. If, on the other hand, the mortgage is on only a portion of the cooperative project there may be distinct advantage in giving the purchaser at the foreclosure sale the power to reconvey the property to the association and having the purchaser become owner of the units which would exist or could be created in the property. In such a case, the position of the mortgagee would be essentially the same as that of a declarant who acquires the special declarant right to add additional land to the cooperative.

If the developer, while in control of the cooperative association, has had the cooperative association grant a mortgage in its real estate and has subordinated the declaration to the mortgage, the situation is the same as that just described: on foreclosure, that real estate would no longer be a part of the cooperative. Again, in the ordinary case no special declarant rights could pass to the purchaser at the foreclosure sale since he would not have any real estate in the cooperative. If, however, the association is obligated to accept a reconveyance of the real estate which has been foreclosed the purchaser at the foreclosure sale would have special declarant rights as just described.

If the declarant in a cooperative has given a mortgage or security interest in his own special declarant rights or in his unsold units, purchasers at the foreclosure sale would acquire rights as to property still in the cooperative and would therefore be able to succeed to the declarant's special declarant rights.

4. Under subsection (b), a transferor declarant remains liable to unit owners (both existing and future) for all obligations and liabilities, including

warranty obligations on all improvements made by him, arising prior to the transfer. If a declarant transfers any special declarant right to an affiliate (as defined in Section 1-103(1)), the transferor remains subject to all liabilities specified in paragraph (1) of subsection (b) and, in addition, is jointly and severally liable with his successor in interest for all obligations and liabilities of the successor.

5. The obligations and liabilities imposed upon transferee declarants under the Act are set forth in subsection (c). In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor by foreclosure or conveyance in lieu of foreclosure) becomes subject to all obligations and liabilities imposed upon a declarant by the Act or by the declaration with respect to any promises, acts, or omissions undertaken subsequent to the transfer which relate to the rights he holds. Such a transferee also is liable for the promises, acts, or omissions of the original declarant undertaken prior to the transfer, except as set forth in paragraph (c)(2)(ii). For example, because of the exclusions in (c)(2)(ii), a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant. Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is liable, however, to complete improvements which the developer is obligated to complete under Section 4-110.

6. To preclude declarants from evading their obligations and liabilities under this Act by transferring their interests to affiliated companies, paragraph (1) of subsection (c) makes clear that any successor declarant who is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the Act or by the declaration. Similarly, as previously noted, paragraph (2) of subsection (b) provides that an original declarant who transfers his rights to an affiliate remains jointly and severally liable with his successor for all obligations and liabilities imposed upon declarants by the Act or by the declaration.

7. The section handles the problem of certain successor declarants (i.e., persons whose sole interest in the project is the protection of debt security) in three ways. First, subsection

(e) provides that, in the case of a foreclosure of a security interest or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust, or sale by a trustee in bankruptcy of all units owned by a declarant, if the transferee of such units does not request the transfer of special declarant rights then, under subsection (d), those special declarant rights cease to exist and any period of declarant control terminates.

Second, any person who succeeds to special declarant rights as a result of the transfers just described, or by a conveyance in lieu of foreclosure, may, pursuant to paragraph (4) of subsection (c), declare his intention (in a recorded instrument) to hold those rights solely for transfer to another person. Thereafter, such a successor may transfer all special declarant rights to a third party acquiring title to any units owned by the successor but may not, prior to such transfer, exercise any special declarant rights other than the right to control the executive board of the association in accordance with the provisions of Section 3-103(c). A successor declarant who holds special declarant rights solely for transfer is relieved of any liability under the Act except liability for any acts or omissions related to his control of the executive board of the association. This provision is designed to deal with the typical problem of a foreclosing lender who opts to bid in and obtain the project at the foreclosure sale solely for the purpose of subsequent resale. It permits a foreclosing lender to undertake such a transaction without incurring the full burden of declarant obligations and liabilities. At the same time, the provision recognizes the need for continuing operation of the association and, to that end, permits a foreclosing lender to assume control of the association for the purpose of ensuring a smooth transition.

Third, paragraph (3) of subsection (c) provides that a successor who has only the right to maintain model units, sales offices, and signs does not there-

by become subject to any obligations or liabilities as a declarant, except for the obligation to provide a public offering statement and any liability resulting therefrom. This provision also is designed to protect mortgage lenders and contemplates the situation where a lender takes over a project and desires to sell out existing units without making any additional improvements to the project. This provision facilitates such a transaction by relieving the mortgage lender, in that instance, from the full burden of obligations and liabilities ordinarily imposed upon a declarant under the Act.

Under Section 2-110, a declarant may reserve the right to create additional units in portions of a common interest community which were originally designated as common elements, even though, in a condominium, rights

of unit owners have otherwise attached to the common elements, and even though, in a planned community or cooperative, the common elements have been conveyed to the association. The declarant, upon creation, becomes the owner of any units created. The right to create the units is an interest in land which may be sold or in which a security interest may be granted. If the mortgagee of that interest forecloses, the purchaser at the foreclosure sale has the choices concerning development rights and resulting liability which are described in the preceding paragraph. That is, under subsections (c) and (d), the purchaser may limit his liability by agreeing to hold the developments only for the purpose of transfer as provided by paragraph (c)(4) or may buy the rights under paragraph (e).

§ 3-105. Termination of Contracts and Leases of Declarant

If entered into before the executive board elected by the unit owners pursuant to Section 3-103(f) takes office, (i) any management contract, employment contract, or lease of recreational or parking areas or facilities, (ii) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (iii) any contract or lease that is not bona fide or was unenforceable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to Section 3-103(f) takes office upon not less than [90] days' notice to the other party. This section does not apply to: (i) any lease the termination of which would terminate the common interest community or reduce its size, unless the real estate subject to that lease was included in the common interest community for the purpose of avoiding the right of the association to terminate a lease under this section, or (ii) a proprietary lease.

COMMENT

1. This section deals with a common problem in the development of condominium, planned community and cooperative projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity.

The Act deals with this problem in two ways. First, Section 3-103(a) imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, Section 3-105 provides for the termination of certain contracts and leases made during a period of declarant control.

2. In addition to contracts or leases made by a declarant with himself or with an affiliated entity, there are also certain contracts and leases so critical to the operation of the common interest community and to the unit owners' full enjoyment of their rights of ownership that they too should be voidable by the unit owners upon the expiration of any period of declarant control. At the same time, a statutorily-sanctioned right of cancellation should not be applicable to all contracts or leases which a declarant may enter into in the course of developing a project. For example, a commercial tenant would not be willing to invest substantial amounts in equipment and other improvements for the operation of his

business if the lease could unilaterally be cancelled by the association. Accordingly, this section provides that (subject to the exception set forth in the last sentence thereof), upon the expiration of any period of declarant control, the association may terminate without penalty, any "critical" contract (i.e., any management contract, employment contract, or lease of recreational or parking areas or facilities) entered into during a period of declarant control, any contract or lease to which the declarant or an affiliate of the declarant is a party, or any contract or lease previously entered into by the declarant which is not bona fide or which was unconsensable to the unit owners at the time entered into under the circumstances then prevailing.

3. The last sentence of the section addresses the usual leasehold common interest community situation where the underlying real estate is subject to a long-term ground lease. Because termination of the ground lease would terminate the community, this sentence prevents cancellation. However, in order to avoid the possibility that recreation and other leases otherwise cancellable under subsection (a) will be restructured to come within the exception, a subjective test of "intent" is imposed. Under the test, if a declarant's principal purpose in subjecting the leased real estate to the common interest community was to prevent termination of the lease, the lease may nevertheless be terminated.

§ 3-106. Bylaws

(a) The bylaws of the association must provide

- (1) the number of members of the executive board and the titles of the officers of the association;
- (2) election by the executive board of a president, treasurer, secretary, and any other officers of the association the bylaws specify;
- (3) the qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers and filling vacancies;
- (4) which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;
- (5) which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association; and
- (6) a method for amending the bylaws.

(b) Subject to the provisions of the declaration, the bylaws may provide for any other matters the association deems necessary and appropriate.

COMMENT

1. Because the Act does not require the recodification of bylaws, it is contemplated that unrecoded bylaws will set forth only matters relating to the internal operations of the association and various "housekeeping" matters with respect to the common interest community. The Act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be recorded as an exhibit to the declaration.

2. The requirement, set forth in subsection (a)(5), that the bylaws designate which of the officers of the association has the responsibility to pre-

pare, execute, certify, and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this Act to record such amendments in certain circumstances. These provisions include Section 1-107 (Eminent Domain), Section 2-106 (expiration of certain leases), Section 2-112 (Relaxation of Boundaries Between Adjoining Units), and Section 2-113 (subdivision or conversion of units). Section 2-117(c) provides that, if no officer is designated for this purpose, it shall be the duty of the president.

§ 3-107. Upkeep of Common Interest Community

(a) Except to the extent provided by the declaration, subsection (b), or Section 3-113(h), the association is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through his unit reasonably necessary for those purposes. If damage is inflicted on the common elements or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.

(b) In addition to the liability that a declarant as a unit owner has under this [Act], the declarant alone is liable for all expenses in connection with real estate subject to development rights. No other unit owner and no other portion of the common interest community is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real estate subject to development rights inures to the declarant.

(c) In a planned community, if all development rights have expired with respect to any real estate, the declarant remains liable for all expenses of that real estate unless, upon expiration, the declaration provides that the real estate becomes common elements or units.

COMMENT

1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. See Section 1-103(10). As a result, under subsection (a), unless the declaration provides that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under Section 3-115(c), the cost of maintenance, repair, and re-

placement for such limited common elements is assessed against all the units in the common interest community, unless the declaration provides for such expenses to be paid only by the units benefited. See Comment 1 to Section 2-108.

2. Under Section 2-110, a declarant may reserve the right to create units in portions of the common interest community originally designated as common elements. However, under Section 3-107(b), the developer is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate even though, in the case of a planned community or cooperative, it has been conveyed to the association. As to real estate taxes, see Section 1-105(e).

§ 3-108. Meetings

A meeting of the association must be held at least once each year. Special meetings of the association may be called by the president, a majority of the executive board, or by unit owners having 20 percent, ~~as may be determined~~ as specified by the bylaws of the association in the association. Not less than [10] nor more than [60] days in advance of any meeting, the secretary or oth

sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove an officer or member of the executive board.

§ 3-109. Quorums

(a) Unless the bylaws provide otherwise, a quorum is present throughout any meeting of the association if persons entitled to cast [20] percent of the votes that may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting.

(b) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board if persons entitled to cast [50] percent of the votes on that board are present at the beginning of the meeting.

COMMENT

Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings. The

problem is particularly acute in the case of resort common interest communities where many owners may reside elsewhere, often at considerable distances, for most of the year.

§ 3-110. Voting; Proxies

(a) If only one of several owners of a unit is present at a meeting of the association, that owner is entitled to cast all the votes allocated to that unit. If more than one of the owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the owners, unless the declaration expressly provides otherwise. There is majority agreement if any one of the owners casts the votes allocated to that unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.

(b) Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may revoke a proxy given pursuant to this section only by actual notice of revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated or purports to be revocable without notice. A proxy terminates one year after its date, unless it specifies a shorter term.

(c) If the declaration requires that votes on specified matters affecting the common interest community be cast by lessees rather than unit owners of leased units: (i) the provisions of subsections (a) and (b) apply to lessees as if they were unit owners; (ii) unit owners who have leased their units to other persons may not cast votes on those specified matters; and (iii) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners. Unit owners must also be given notice, in the manner provided in Section 3-108, of all meetings at which lessees are entitled to vote.

(d) No votes allocated to a unit owned by the association may be cast.

COMMENT

Subsection (c) addresses an increasingly important matter in the governance of common interest communities: the role of tenants occupying units owned by investors or other persons. Most present statutes require voting by owners in the association. However, it may be desirable to give les-

see, other than lessors, of units the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the common interest community.

§ 3-111. Tort and Contract Liability

Neither the association nor any unit owner except the declarant is liable for that declarant's torts in connection with any part of the common interest community which that declarant has the responsibility to maintain. Otherwise, an action alleging a wrong done by the association must be brought against the association and not against any unit owner. If the wrong occurred during any period of declarant control and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable to the association or to any unit owner for (i) all tort losses not covered by insurance suffered by the association or that unit owner, and (ii) all costs that the association would not have incurred but for a breach of contract or other wrongful act or omission. Whenever the declarant is liable to the association under this section, the declarant is also liable for all expenses of litigation, including reasonable attorney's fees, incurred by the association. Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates. A unit owner is not precluded from maintaining an action contemplated by this section because he is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by Section 3-117 (Other Liens).

COMMENT

1. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. This changes the law in states where plaintiffs are forced to name individual unit owners as the real parties in interest to any action brought against the association. The subsection also provides that a unit owner is not precluded from bringing an action in tort or contract against the association solely because he is a unit owner or a member or officer of the association.

2. In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to Section 3-103, subse-

ction (a) provides that the association or any unit owner has a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any period of declarant control. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.

3. If a suit based on a claim which accrued during the period of developer control is brought against the association after control of the association has passed from the developer, reason-

able notice to, and grant of an opportunity to the developer to defend, are conditions to developer liability. If, however, suit is brought against the association while the developer is still

in control, obviously the developer cannot later resist a suit by the association for reimbursement on the grounds of failure to notify.

§ 3-112. Conveyance or Encumbrance of Common Elements

(a) In a condominium or planned community, portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least [80] percent of the votes in the association, including [80] percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; but all owners of units to which any limited common element is allocated must agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses. Proceeds of the sale are an asset of the association.

and proceeds of a loan secured by encumbering common areas

(b) Part of a cooperative may be conveyed and all or part of a cooperative may be subjected to a security interest by the association if persons entitled to cast at least [80] percent of the votes in the association, including [80] percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; but, if fewer than all of the units or limited common elements are to be conveyed or subjected to a security interest, then all unit owners of those units, or the units to which those limited common elements are allocated, must agree in order to convey those units or limited common elements or subject them to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Proceeds of the sale are an asset of the association. Any purported conveyance or other voluntary transfer of an entire cooperative, unless made pursuant to Section 2-118, is void.

and proceeds of a loan secured by encumbering common areas

(c) An agreement to convey common elements in a condominium or planned community, or to subject them to a security interest, or in a cooperative, an agreement to convey any part of a cooperative or subject it to a security interest, must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement must specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof must be recorded in every [county] in which a portion of the common interest community is situated, and is effective only upon recordation.

(d) The association, on behalf of the unit owners, may contract to convey an interest in a common interest community pursuant to subsection (a), but the contract is not enforceable against the association until approved pursuant to subsections (a), (b), and (c). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

(e) Unless made pursuant to this section, any purported conveyance, encumbrance, judicial sale, or other voluntary transfer of common elements or of any other part of a cooperative is void.

(f) A conveyance or encumbrance of common elements or of a cooperative pursuant to this section does not deprive any unit of its rights of access and support.

(g) Unless the declaration otherwise provides, a conveyance or encumbrance of common elements pursuant to this section does not affect the priority or validity of pre-existing encumbrances.

(h) In a cooperative, the association may acquire, hold, encumber, or convey a proprietary lease without complying with this section.

Comment

1. Subsection (a) provides that a condominium or planned community association may sell or encumber portions of the common elements and subsection (b) provides that a cooperative association may sell part, or encumber all, of the cooperative. The difference in treatment of condominiums and planned communities, on the one hand, and cooperatives, on the other, arises out of the fact that in a cooperative title to the entire cooperative is in the association. Also, historically, cooperative associations have had greater control over the regime real estate, including the units, than has been the case in condominiums or planned communities.

The power given by subsections (a) and (b) can be exercised only on agreement of unit owners holding 80% of the votes in the association (80% is the percentage required for termination of a common interest community under Section 2-118). This power may be exercised during the period of declarant control, but, in order to be effective, 80% of non-declarant unit owners must approve the action. The ability, without termination, to sell common elements in a condominium or planned community or to sell part of a cooperative gives common interest communities desirable flexibility. For example, the unit owners, some years after the initial creation of the common interest community may decide to convey away a portion of the open

space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber real estate in the common interest community gives the association power to raise money for improvements through the device of mortgaging the improvements themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates.

2. Subsection (c) requires that the agreement for sale or encumbrance be evidenced by the execution of an agreement in the same manner as a deed by the requisite majority of the unit owners. The agreement then must be recorded in the land records. The recorded agreement signed by the unit owners is not the conveyance itself, but is rather a supporting document which shows that the association has full power to execute a deed or mortgage. Under subsection (d) it is contemplated that the association will execute the actual instrument of conveyance. Under subsection (f), a conveyance or encumbrance under this section may not deprive a unit owner of rights of access and support.

§ 3-113. Insurance

(a) Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent reasonably available:

(1) property insurance on the common elements and, in a planned community, also on property that must become common elements, insuring against all risks of direct physical loss commonly insured against or, in the case of a conversion building, against fire and extended coverage perils. The total amount of insurance after application of any deductibles must be not less than ~~of~~ percent of the actual cash value of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations, and other items normally excluded from property policies; and

(2) liability insurance, including medical payments insurance, in an amount determined by the executive board but not less than any amount specified in the declaration, covering all occurrences commonly insured against for death, bodily injury, and property damage arising out of or in

connection with the use, ownership, or maintenance of the common elements and, in cooperatives, also of all units.

(b) In the case of a building that is part of a cooperative or that contains units having horizontal boundaries described in the declaration, the insurance maintained under subsection (a)(1), to the extent reasonably available, must include the units, but need not include improvements and betterments installed by unit owners.

(c) If the insurance described in subsections (a) and (b) is not reasonably available, the association promptly shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all unit owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it considers appropriate to protect the association or the unit owners.

(d) Insurance policies carried pursuant to subsections (a) and (b) must provide that:

(1) each unit owner is an insured person under the policy with respect to liability arising out of his interest in the common elements or membership in the association;

(2) the insurer waives its right to subrogation under the policy against any unit owner or member of his household;

(3) no act or omission by any unit owner, unless acting within the scope of his authority on behalf of the association, will void the policy or be a condition to recovery under the policy; and

(4) if, at the time of a loss under the policy, there is other insurance in the name of a unit owner covering the same risk covered by the policy, the association's policy provides primary insurance.

(e) Any loss covered by the property policy under subsections (a)(1) and (b) must be adjusted with the association, but the insurance proceeds for that loss are payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any holder of a security interest. The insurance trustee or the association shall hold any insurance proceeds in trust for the association, unit owners, and lien holders as their interests may appear. Subject to the provisions of subsection (b), the proceeds must be disbursed first for the repair or restoration of the damaged property, and the association, unit owners, and lien holders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored, or the common interest community is terminated.

(f) An insurance policy issued to the association does not prevent a unit owner from obtaining insurance for his own benefit.

(g) An insurer that has issued an insurance policy under this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any unit owner or holder of a security interest. The insurer issuing the policy may not cancel or refuse to renew it until 30 days after notice of the proposed cancellation or non-renewal has been mailed to the association, each unit owner and each holder of a security interest to whom a certificate or memorandum of insurance has been issued at their respective last known addresses.

(h) Any portion of the common interest community for which insurance is required under this section which is damaged or destroyed must be repaired or replaced promptly by the association unless (i) the common interest community is terminated, in which case Section 2-102 applies (ii) repair or replacement would be illegal under any state or local statute or ordinance governing health or safety, or (iii) 80 percent of the unit owners, including every owner of a unit or assigned limited common element that will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire common interest community is not repaired or replaced, (i) the insurance proceeds attributable to

the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the common interest community, and (ii) except to the extent that other persons will be distributees (Section 2-105(a)(2)(ii)), (A) the insurance proceeds attributable to units and limited common elements that are not rebuilt must be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lien holders, as their interests may appear, and (B) the remainder of the proceeds must be distributed to all the unit owners or lien holders, as their interests may appear, as follows: (1) in a condominium, in proportion to the common element interests of all the units and (2) in a cooperative or planned community, in proportion to the common expense liabilities of all the units. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under Section 1-107(a), and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations.

(i) The provisions of this section may be varied or waived in the case of a common interest community all of whose units are restricted to non-residential use.

COMMENT

1. Subsections (a) and (b) provide that the required insurance must be maintained only to the extent reasonably available. This permits the association to comply with the insurance requirements even if certain coverages are unavailable or unreasonably expensive.

2. Subsection (b) represents a significant departure from the present law as to condominiums and planned communities in virtually all states by requiring that the association obtain and maintain property insurance on both the common elements and the units within buildings with "stacked" units. See Comment 3. While it has been common practice in many parts of the country (either by custom or as mandated by statute) for associations to maintain property insurance on the common elements, it has generally not been the practice for the property insurance policy to cover individual units as well. However, given the great interdependence of the unit owners in the stacked unit situation, mandating property insurance for the entire building is the preferable approach. Moreover, such an approach will greatly simplify claims procedures, particularly where both common elements and portions of a unit have been destroyed. If common elements and units are insured separately, the insurers could be involved in disputes as to the coverage provided by each policy.

The Act does not mandate association insurance on condominium or planned community units in town house or other arrangements in which there are no stacked units. However, if the

developer wishes, the declaration may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units.

In a cooperative, the association must carry insurance on all units since legal title to all units is in the association.

3. The distinction between what is a common element and what is a unit with respect to the insurance coverage required by this section is complex. The definitions of common elements and a unit in Section 1-103(1) and (3) are not sufficient for this purpose. To determine the distinction between the common elements and units, one must refer first to the declaration's section on unit boundaries. That section will define the unit boundaries. If the declaration fails to do so, and if ceilings, walls, or floors are boundaries, the provisions of Section 2-102 apply.

Section 2-102 provides that, if the declaration is silent, all non-loadbearing and non-structural portions of the walls, floors and ceilings are part of the unit, while all loadbearing and structural portions of the walls, floors and ceilings are common elements. Further, with respect to any structure partially within and partially outside of the boundaries of a unit, any portion thereof serving only that unit is a limited

ited common element (see definition in Section 1-103(19)), and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

Under 2-102, all spaces, interior partitions, electrical, plumbing and mechanical systems, and all other items within the boundaries of the unit which are attached to the unit boundaries, whether or not deemed fixtures under state law, are part of the unit.

Put simply, if any item is installed, constructed, repaired or replaced by the declarant or his successor in connection with the original sale of a stacked unit, the item is insured by the association. Clearly, this does not include items of personal property easily movable within the unit or easily removable from the unit (whether or not deemed a fixture under state law), such as a vase, table or other furnishings. If improvements or betterments are made to a unit by a unit owner, they will typically be covered under the owner's insurance policy, even if the unit itself is generally covered by the association's policy, since most policies exclude "improvements or betterments made by the owner", and the Act does not mandate improvements and betterments coverage. The subject is a complex one, and careful attention should be paid to it by the association's insurance advisor.

4. Although "all risk" coverage is not required as to conversion buildings, but merely fire and extended coverage, this is not intended to imply that such coverage is unnecessary. "All risk" coverage is not required because it may not be appropriate in the case of an unrenovated conversion where cost is a critical factor.

5. The minimum requirement as to the amount of insurance, which is 80% of the actual cash value, should not be viewed as a recommendation; rather, the 80% is a floor. Typically, many common interest community documents require insurance in an amount equal to 100% of the replacement cost of the insured property. The Act permits greater flexibility, however, inasmuch as different types of construction and varieties of projects may not require such total coverage with its attendant higher premium cost.

6. Subsection (a)(2) covers only the liability of the association, and unit

owners as members, but does not cover the unit owner's individual liability for his acts or omissions or liability for occurrences within his unit.

7. Clause (i) of the third sentence of subsection (b) would operate as follows: (1) if the common interest community consists of campsites, restoration after fire damage might consist of merely resodding the area damaged; (2) if the common interest community consists of separate garden type buildings, restoration after fire damage might consist of demolishing the remaining structure and paving or land scraping the area; and (3) if the common interest community consists of a single high rise building, restoration may not be required (if the building is substantially destroyed) inasmuch as "a condition compatible with the remainder of the common interest community" would be damaged and unrepaired.

8. The scheme of this section, as set forth in subsection (b), is that any damage or destruction to any portion of the common interest community must be repaired (if repairs can be made consistent with applicable safety and health laws) absent a decision to terminate the common interest community or a decision by 80% of the unit owners (including the owners of any damaged units) not to rebuild. Unless a decision is made not to rebuild, any available insurance proceeds must be used to effectuate such repairs. For this reason, subsection (c) provides that any loss covered by the association's property insurance policy shall be adjusted with the association and that the proceeds for any loss shall be payable to the association or to any insurance trustee that may be designated for such purpose. Significantly, such insurance proceeds may not be paid to any mortgagee or other outside party. This provision is necessary to insure that insurance proceeds are available to effectuate any repairs or restoration to the common interest community that may be required.

If units or limited common elements are not rebuilt, insurance proceeds are to be distributed to lienholders or owners of units unless the declaration provides that such payments are to go to some other person.

§ 3-114. Surplus Funds

Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves must be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments.

COMMENT

Surplus funds of the association are generally used first for the prepayment of reserves, and remaining funds are thereafter credited to the account of unit owners or paid to them. In some cases, however, unit owners might prefer that surplus funds be used for other purposes (e.g., the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any other use of surplus funds.

§ 3-115. Assessments for Common Expenses

(a) Until the association makes a common expense assessment, the declarant shall pay all common expenses. After an assessment has been made by the association, assessments must be made at least annually, based on a budget adopted at least annually by the association.

(b) Except for assessments under subsections (c), (d), and (e), all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to Section 2-107(a) and (b). Any past due common expense assessment or installment thereof bears interest at the rate established by the association not exceeding 12% percent per year.

(c) To the extent required by the declaration:

(1) any common expense associated with the maintenance, repair, or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion the declaration provides;

(2) any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited; and

(3) the costs of insurance must be assessed in proportion to risk and the costs of utilities must be assessed in proportion to usage.

(d) Assessments to pay a judgment against the association (Section 3-117(a)) may be made only against the units in the common interest community at the time the judgment was entered, in proportion to their common expense liabilities.

(e) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit.

(f) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due must be recalculated in accordance with the reallocated common expense liabilities.

COMMENT

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of project development, to pay all of the expenses of the common interest community himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the project and wishes to avoid billing the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the common interest community, is unwilling to make payments for replacement reserves or for other expenses which he expects

if not otherwise determined, can be determined by such an assessment.

will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (e), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a common interest community after a judgment has been entered against the association, the new units are not as-

essed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a common interest community by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision of units).

§ 3-115. Lien for Assessments

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recording of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [The lien under this section is not subject to the provisions of [insert appropriate reference to state homestead, dower and curtesy, or other exemption].

(c) If the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recording of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(i) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(j) The association's lien may be foreclosed as provided in this subsection:

(1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];

(2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection (k)]; or

(3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code.]

(4) In the case of foreclosure under [insert reference to state power of sale statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

(k) In a cooperative, if the unit owner's interest in a unit is real estate (Section 1-105):

(1) The association, upon non payment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation, and at any time and place. Every aspect of the sale, including the method, advertising, time, place, and terms, must be reasonable. The association shall give to the unit owner and any lessees of the unit owner reasonable written notice of the time and place of any public sale or, if a private sale is intended, of the intention of entering into a contract to sell and of the time after which a private disposition may be made. The same notice must also be sent to any other person who has a recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record 7 weeks before the date specified in the notice as the date of any public sale or 7 weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. Sale may not be held until 5 weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

(2) Unless otherwise agreed, the debtor is liable for any deficiency in a foreclosure sale. *under AS 9.45.170.*

(3) The proceeds of a foreclosure sale must be applied in the following order:

- (i) the reasonable expenses of sale;
- (ii) the reasonable expenses of securing possession before sale; holding, maintaining, and preparing the unit for sale, including pay-

ment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by agreement between the association and the unit owner, reasonable attorney's fees and other legal expenses incurred by the association;

(iii) satisfaction of the association's lien;

(iv) satisfaction in the order of priority of any subordinate claim of record; and

(v) remittance of any excess to the unit owner.

(4) A good faith purchaser for value acquires the unit free of the association's debt that gave rise to the lien under which the foreclosure sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with the requirements of this section. The person conducting the sale shall execute a conveyance to the purchaser sufficient to convey the unit and stating that it is executed by him after a foreclosure of the association's lien by power of sale and that he was empowered to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of non-payment of the assessment and of the giving of the notices required by this subsection are sufficient proof of the facts recited and of his authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

(5) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.]

COMMENT

1. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recording of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit.

If the lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

In cooperatives, the association has legal title to the units and depending on the election made in the declaration pursuant to Section 2-118(i) may have power to create, assume, or take subject to security interests in the units which have priority over the interest of unit owners. Obviously, the cooperative association's lien should not have priority over an interest which the association itself has given, assumed, or taken subject to and subsection (b) expressly so provides.

The special reference to cooperatives in subsection (b)(ii) merely recognizes that in a cooperative both the association and the unit owner have an interest in a unit.

2. Units may be part of two common interest communities. For example, a large real estate development

may consist of one or more condominiums which are also part of a larger planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

3. Subsection (f) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. The rights of the association against a unit upon nonpayment of an assessment on that unit depends on whether the common interest community is a condominium or planned community on the one hand, or a cooperative on the other.

In the typical cooperative the association will have a substantial underlying mortgage on all or a substantial portion of the real estate in the cooperative and a large part of each unit owner's periodic assessment will go toward payment of that particular unit's proportionate share of the mortgage. If the unit owner fails to pay his assessment on time, the association may be forced into default on its own mortgage payments with consequent possible foreclosure of the underlying mortgage and loss by all unit owners of their interests in the cooperative. Therefore, in the cooperative context it is essential that the cooperative association have a fast and effective remedy for failure of a unit owner to pay his assessment. The act provides in Subsection (i) that upon nonpayment the cooperative unit owner may be evicted in the same manner as an unlawfully holding over commercial tenant. Those rules will ordinarily be the most rapid and efficient rules in the state as to eviction of tenants.

If the unit owner's interest is real estate, subsection (j)(2) then offers

the state two alternatives as to nonjudicial foreclosure of a cooperative association's lien. The first alternative is power of sale under any existing state statute authorizing power of sale under mortgages. If there is no power of sale statute or if the legislature chooses to adopt a special power of sale provision for foreclosure of the lien on cooperative units, the state can choose the 2d alternative: power of sale under subsection (k) of this section.

Subsection (k), which is patterned after the power of sale foreclosure provisions of the Uniform Land Transactions Act, is a modern power of sale provision which frees private power of sale foreclosure from many of the costly, time consuming, and inefficient producing strictures of most existing private power of sale statutes. At the same time, it provides reasonable protection to the unit owner and junior interests.

If the unit owner's interest in a cooperative is personal property, the association's lien is foreclosed as if it were a security interest under Article 9 of the Uniform Commercial Code. Article 9 foreclosure is generally less expensive and faster than either judicial or power of sale real estate foreclosure. This difference in cost and speed of foreclosure, both for association liens and security interests, is one of the major factors to be considered in choosing whether, under Section 1-105, the unit owner's interest in a cooperative will be real property or personal property. Article 9 foreclosure is currently used in foreclosing security interests in mobile homes, and has been accepted in the various states as a permissible method of foreclosure in that housing area without serious challenge.

In a condominium or planned community, there is not likely to be a substantial underlying mortgage for which unit owners are assessed. Therefore, failure to pay assessments on time will have less serious consequences for the association than in the case of cooperatives. The section provides that the association lien in a condominium or planned community is to be foreclosed according to the rules generally applicable to real estate mortgages in the state rather than setting out a special faster method of foreclosure in the statute.

§ 3-117. Other Liens

(a) In a condominium or planned community:

(1) Except as provided in paragraph (2), a judgment for money against the association [if recorded] [if docketed] [if [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment]], is not a lien on the common elements, but is a lien in favor of the judgment lien holder against all of the units in the common interest community at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(2) If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 3-112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

(3) Whether perfected before or after the creation of the common interest community, if a lien, other than a deed of trust or mortgage (including a judgment lien or lien attributable to work performed or materials supplied before creation of the common interest community), becomes effective against two or more units, the unit owner of an affected unit may pay to the lien holder the amount of the lien attributable to his unit, and the lien holder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

(4) A judgment against the association must be indexed in the name of the common interest community and the association and, when so indexed, is notice of the lien against the units.

(b) In a cooperative:

(1) If the association receives notice of an impending foreclosure on all or any portion of the association's real estate, the association shall promptly transmit a copy of that notice to each unit owner of a unit located within the real estate to be foreclosed. Failure of the association to transmit the notice does not affect the validity of the foreclosure.

(2) Whether or not a unit owner's unit is subject to the claims of the association's creditors, no other property of a unit owner is subject to those claims.

COMMENT

1. This section deals with the effect on unit owners of judgments against the association. The issue is not free from difficulty. Presently, in most states, if the association is organized as a corporation, the unit owners are likely to receive the insulation from liability given shareholders of a corporation, so that the judgment lienholder can satisfy his judgment only against the property of the association. On the other hand, if the association is organized as an unincorporated association, under the law of most states each unit owner would have joint and several liability on the judgment. This Act strikes a balance between the two extremes.

2. In condominiums and planned communities, the Act makes the judgment lien a direct lien against each individual unit, but allows the individual unit owner to discharge the lien by payment of his pro-rata share of the judgment based on that unit's relative common expense liability. The judgment would also create a lien against any property owned by the association. In cooperatives, title to the units is in the cooperative so that it is not necessary for the Act to provide that a judgment against the association creates a lien against units. The Act does provide, however, that no property of a cooperative unit owner other than the unit is subject to the claims

of association creditors. The result is that the relationship between creditors of the association and unit owners is similar in all three forms of ownership.

There are, however, significant differences between cooperatives and condominiums or planned communities as to the position of unit owners as against association creditors. In one respect cooperative unit owners have greater liability than condominium or planned community unit owners and in another respect they have lesser liability.

	Unit A	Unit B	Unit C	Unit D
Value	\$100,000	\$100,000	\$100,000	\$100,000
Mortgage	50,000	10,000	90,000	75,000
Equity	50,000	10,000	10,000	25,000

In a condominium or planned community, the judgment lien attaches to each unit in proportion to that unit's liability for common expense liability. If, in the above example, the common expense liability is equal, the lien would attach to each unit for \$12,500. Therefore, the association judgment creditor could reach the full equity of Unit owners B and C in their units, but could reach only \$12,500 of the interest of Unit owners A and D. Since the association cannot assess A and D for any additional amounts of the judgment, if B and C allow their interest to be foreclosed and foreclosure produces only \$20,000, the association judgment creditor will collect only \$15,000 of its \$50,000 judgment. That is less than it would collect if all unit owners' interests in units were fully liable, but more than it would collect if only association assets were subject to attachment. (The judgment creditor may, however, satisfy his judgment in full by reaching the income stream of the association by appropriate creditor process.)

In a cooperative, on the other hand, the association creditor can reach the entire interest of any of the unit owners in their units and will have its judgment satisfied in full.

The liability of cooperative unit owners to association judgment creditors is less than that of unit owners in condominiums and planned communities in that there is no statutory provision giving the judgment creditor a direct lien against units. Since, in a cooperative, title to the units is in the cooperative, a judgment creditor of the association will have a lien on the units, but under ordinary recording and pri-

They have greater liability in that, in a cooperative, if a judgment lien has priority over a unit owner's interest in a unit, the lien against the unit is not limited to the unit's common expense liability percentage. In contrast, in a condominium or planned community, the lien against a unit is only for the unit owner's pro-rata share of the judgment. For example, suppose a four unit community in which there is a judgment against the association for \$50,000. Further, suppose that each of the units has a value of \$100,000 and that there are outstanding mortgages as follows:

riority rules, that lien will be subordinate to unit owner interests in units if those interests were recorded prior to the attachment of the judgment lien. Therefore, in a cooperative, there is a possibility that the judgment lienor will have no rights as against the interests of the unit owners. However, the declaration may provide that association creditors have priority over the interests of cooperative unit owners, and, if it does so, such a provision is effective (See Section 2-118), and even in the absence of Section 2-118 would be effective, as a general subordination of unit owner interests to creditors of the association. (The Act in Section 2-118 requires that all creditors of the association be treated in the same way as to priority against unit owners so that the declaration cannot provide, for example, that only contract creditors have priority over unit owners or, for another example, that only regulated financial institution debt has priority. However, the unit owners might subordinate their interest to the rights of individual creditors of the association by giving that individual creditor a subordination agreement.)

However, upon termination of the cooperative, liens against the cooperative which did not have priority over the cooperative interests do become proportional fractional liens against each individual cooperative interest (see Section 2-118(f) and the comments thereto).

3. The provisions of Section 2-117 applicable to condominiums and planned communities were adopted after substantial consideration by the committee and the National Conference and achieve what the drafters believe

Is appropriate unit owner liability for association debts. The somewhat different treatment given cooperatives arises out of the different history of cooperatives and out of the different tradition as to financing of cooperatives. The rules just stated in effect continue the existing law as to the relationship between cooperative unit owners (today commonly called proprietary lessees) and association creditors. The provisions also take account of a common way of financing cooperatives: in the typical cooperative, the cooperative association will take title to the real estate and will assume or take subject to existing mortgages on the real estate, or if there are no existing mortgages, will borrow a significant portion of the purchase price of the cooperative real estate and secure that price by a mortgage on the real estate. Thereafter, when individual units are conveyed (leased) to individual unit owners, the unit owner's interest will be subject to the prior recorded underlying mortgage. The unit owner also will commonly borrow money on the security of his lease interest to pay the purchase price of the unit owner's interest. Unless a subordination agreement has been taken from the unit owner or subordination of unit owner interest to subsequent association creditors is provided for in the declaration, the unit purchase financing lender who lends on the security of the unit owner's interest can assess his risk on the assumption that he will never be subject to a greater proportion of the underlying debt than he is at the time the loan is originally made. If there is a subordination agreement, the unit financing lender knows that his security interest is subject to being entirely defeated by subsequent transactions between the association and its creditors. In the cooperative context, that system has worked reasonably well, and many people with substantial experience with housing cooperatives wished to continue that system in the Model Real Estate Cooperative Act and in the Uniform Common Interest Ownership Act.

In the case of condominiums and planned communities, while the condominium or planned community judgment creditor has a direct lien against the units, the lien against a particular unit is limited to that unit's common interest percentage liability, and based on ordinary priority rules, the association judgment creditor's lien will be junior to any prior perfected liens or security interests in the unit owner's

unit. Since the priority between association judgment creditors and holders of security interests or liens against individual units in condominiums or planned communities will be determined according to ordinary priority rules, as is the case of cooperatives in the absence of subordination agreements, the result as between association judgment creditors and holders of security interest or liens on individual units is essentially the same under all three acts. However, as pointed out above, as against the unit owner himself, the cooperative association lien creditor who has priority over a unit owner's interest will have greater rights than does the association judgment creditor in the case of condominiums and planned communities.

It should be noted that, while the judgment lien runs directly against unit owners in condominiums and planned communities, the actual liability of the unit owner is almost identical with what it would be if the ordinary corporation rule insulating the unit owner from direct liability were applied. If the incorporated condominium or planned community association only is liable for a judgment, it will, of course, have no assets to satisfy the judgment except whatever personal property and real estate not a part of the common elements it owns. If a checking account or other cash funds of the association are attached or garnished by the creditor, the association, in order to maintain its operations and fulfill its other obligations, will be obliged to make an additional assessment against the unit owners to cover the judgment. The same result follows if the association is to prevent the sale of other assets at an execution sale. That additional assessment would be in precisely the amount for which this Act gives a direct lien against the individual unit owners. Further, if an association which is without sufficient assets to satisfy a judgment refuses to make assessments from which the creditor can have his claim satisfied, it is very likely that a court, in a supplemental proceeding on the judgment, would direct the association to make the necessary assessments against the unit owners. Unpaid assessments made by the association constitute liens against units just as do judgments.

Therefore, whether the lien of the judgment creditor runs against the units directly, or whether the lien is only against the association which finds it necessary to make additional assessments to satisfy the judgment, the unit owner who does not pay his

proportionate share will end up with a lien against his unit.

The differences, therefore, between the lien system established by Section 3-117 for condominiums and planned communities and the system which would be applicable if ordinary corporation rules were applied are these:

(1) The unit owner can discharge his unit from the lien and free it from the possibility of being subsequently assessed by the association for the judgment by making a payment directly to the lien holder. This ability may be valuable to a unit owner who is in the process of selling or securing a mortgage on his unit during the period between the time the judgment is entered and the time the association makes a formal assessment against individual unit owners for the amount of the judgment lien.

(2) The judgment creditor through his ability to threaten to foreclose the lien on an individual unit if the judgment is not paid is given some leverage over individual unit owners to encourage them to see that the association pays the judgment. Procuring an assessment through pressure on individual unit owners may be quicker and cheaper for the judgment creditor than using supplemental proceedings and having a judge order that the board of directors make the necessary assessment.

(3) In the rare case where, under corporation law an association could avoid payment of a judgment by dissolution of the association and vesting of title to the units or common elements the unit owners as tenants-in-common or otherwise, the National Conference of Commissioners on Uniform State Laws believes that that result is inappropriate, and that the unit in the condominium or planned community itself should be viewed as equity property of

the association capable of being reached by judgment creditors in satisfaction of the judgment. As a matter of social policy the condominium or planned community association is in quite a different position than the ordinary corporation. The corporation statutes provide shareholders immunity from liability for debts of the corporation to encourage investment in corporations whose entrepreneurial activities in the marketplace contribute to the general wealth and well-being of society. The condominium or planned community association, in managing the affairs of the homeowners, does not serve the same entrepreneurial function. It seems reasonable, as a matter of social policy, that an individual homeowner who would be fully liable for debts incurred in the renovation and maintenance of his home or for torts caused by his failure to adequately maintain the premises should not be able to entirely avoid that liability through the device of organizing with other homeowners into a condominium or planned community association. On the other hand, it is perhaps not fair to a unit owner in a condominium or planned community regime to have all of his assets at risk based on the contracts of the association over which he has little control and as to which he has only a fractional interest or benefit.

It should be noted that, except for situations in which the association has given a mortgage or deed of trust on common elements, the judgment creditor cannot assert a lien against common elements, but is rather left in a lien against the units. That is, the judgment creditor has no power to levy on the golf course or on the swimming pool or other open spaces and sell them independently of the units to satisfy the judgment.

§ 3-118. Association Records

The association shall keep financial records sufficiently detailed to enable the association to comply with Section 4-109. All financial and other records must be made reasonably available for examination by any unit owner and his authorized agents.

§ 3-119. Association as Trustee

With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper ex-